Volume 181 Fall 2004

MILITARY LAW REVIEW

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MILITARY LAW REVIEW

Volume 181 **Fall 2004**

CAN A COMMANDER AUTHORIZE SEARCHES & SEIZURES IN PRIVATIZED HOUSING AREAS?

MAJOR JEFF A. BOVARNICK[1]

It is then said that, apart from the Code, under immemorial custom a military commander has virtually unlimited authority to authorize searches on a military station . . . and that he must possess that power for the safety and discipline of his command and his subordinates.[2]

I. The Case of the Smoking Gun

A. The Crime Scene

Screams are silenced by gunshots in the installation housing area. Sergeant First Class (SFC) Jones hears the shots coming from the vicinity of Staff Sergeant (SSG) Smith's house next door and he immediately calls 911. When SFC Jones looks out his window, he sees someone running across the street into SSG Brown's quarters. Law enforcement officials arrive, enter the Smith quarters after no one answers the door, and find Mrs. Smith lying dead on the floor with a gunshot wound to her head. Sergeant First Class Jones informs the lead agent on the scene that he believes

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1. Judge Advocate, U.S. Army. Presently assigned as Chief, Military Justice, 82d Airborne Division, Fort Bragg, North Carolina. LL.M., 2002, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia; J.D., 1992, New England School of Law; B.B.A., 1988, University of Massachusetts at Amherst. Previous assignments include: 101st Airborne Division (Air Assault), 1993-1996 (Trial Counsel, 1994-1995; Chief, Operational Law, 1995-1996); Fort Bragg Field Office, U.S. Army Trial Defense Service, 1996-1997 (Defense Counsel); Joint Readiness Training Center, Fort Polk, Louisiana, 1998 (Observer/Controller); Fort Sam Houston, Texas, 1999-2001 (Chief, Criminal Law Division, 1999-2000; Chief, Client Services Division, 2001). Member of the bars of Massachusetts, the Court of Appeals for the Armed Forces, and the Supreme Court of the United States. Previous publications: Perpich v. U.S. Dep't of Defense, *Who's in Charge of the National Guard?*, 26 NEW ENG L. REV. 453 (1991); *Trying to Remain Sane Trying an Insanity Case: United States v. Captain Thomas S. Payne*, ARMY LAW., June 2002, at 13 (co-author, Captain Jackie Thompson).

2. Saylor v. United States, 374 F.2d 894, 899 (Ct. Cl. 1967).

SSG Smith is in the field with his unit, and also about the person he saw running into SSG Brown's quarters after he called 911. About five minutes after SFC Jones called 911, SSG Brown, the occupant of the quarters across the street, also called the Military Police (MP) station and reported hearing gunshots. After numerous police vehicles arrived on the scene, SSG Brown comes out of his quarters, approaches SFC Jones and the agent interviewing him, and makes the unsolicited statement that he was outside, and after he heard the shots, he ran into his house to call the police. Within the hour, after confirming that SSG Smith was in the field with his unit, SSG Brown has become a suspect in Mrs. Smith's murder. The lead agent asks SSG Brown if he owns a gun and SSG Brown says that he does, but that it is in storage. The agent asks SSG Brown if he can go into his quarters to have a look around, but SSG Brown denies the request, tells the agent his wife is out of town, and then refuses to answer any more questions and asks for an attorney. The agent apprehends SSG Brown and orders his quarters sealed. After ensuring the crime scene is secure, the agent briefs the Garrison Commander on the situation and requests authorization to search SSG Brown's quarters. One additional fact: the quarters are in privatized housing.

B. The Smoking Gun

The lead agent prepares a written affidavit and personally briefs the garrison commander on all of the facts known to him. Finding probable cause, the garrison commander authorizes a search of SSG Brown's quarters for a gun. During the course of his search, the agent finds what turns out to be a recently fired, unregistered handgun stashed in the attic crawl space of SSG Brown's quarters. Other than SSG Brown's admission that he was in the area at the time the shots were fired and SFC Jones' corroborating identification, there is no other evidence linking SSG Brown to the crime scene at the Smith quarters. The only evidence linking SSG Brown to the murder of Mrs. Smith is the smoking gun found in his attic.

C. The Motion to Suppress

In a pretrial motion, the defense moves to suppress the handgun, claiming its discovery was the result of an illegal search. The defense bases it claim primarily on the commander's lack of authority over the land. The defense claims the "installation housing" area is not actually installation housing, but rather a private enclave on the federal installation.

The defense has attached the privatized housing contract to its motion demonstrating that the land was in fact conveyed to private developers by the government. A second defense exhibit is a copy of the rental agreement between SSG Brown and the private landlord. The lease requires SSG Brown to pay rent to the private landlord, but it also contains a clause authorizing the commander the right to enter the premises to inspect the property. It is the latter clause that the defense argues the government required the private landlord to put that clause in the leases and the government cannot, via a contract clause, bargain away a third party's constitutional right against an unlawful search. Swamped with more important motions in the capital murder case against SSG Brown, the lead trial counsel gives this suppression motion a cursory glance and assigns it to an assistant trial counsel. In a one paragraph response, the government acknowledges the facts as laid out by the defense and simply cites Military Rule of Evidence (MRE) 315(d)(1)[3] and the authority of commanders to authorize searches over property situated on a military installation.[4]

II. Introduction

This article examines the well-established concept of a commander's authority[5] to authorize searches over property he controls[6] in conjunction with the relatively new concept of privatized housing on military installations.[7] Specifically, does a military commander control privatized housing? The issue of control is essential to a commander's authority to issue search authorizations. In the privatized housing arena, installation land can be leased or conveyed outright to a private entity. When housing is privatized, does the commander still control the land? While the general concept of privatized housing is for the government to relinquish control of its housing operations, is the intent for commanders to relinquish control over the privatized housing areas? If so, then a commander who does not control privatized housing on the installation cannot authorize a search therein. If the commander does not have control over privatized housing, yet authorizes a search therein, then the result would be an illegal search

3. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 315(d)(1) (2002) [hereinafter MCM]. A commander "who has *control over the place* where the property or person to be searched is situated or found, or, if that place is not under military control, having control over persons subject to military law or the law of war" has the power to authorize a search pursuant to this rule. *Id.* (emphasis added).

and potentially a violation of the service member's Fourth Amendment guarantee against unreasonable searches.[8]

This article's primary focus is to explore the issues associated with a

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4. This hypothetical attempts to portray a realistic fact pattern where a commander is called upon to authorize a search authorization in a privatized housing area. This fact pattern focuses solely on the commander's control over the privatized housing which is located within the borders of the installation. While search and seizure cases can present numerous issues, the narrow issue presented here is a probable cause search under MRE 315(d).

This article does not address MRE 314 searches that do not require probable cause. "Government property may be searched under [MRE 314] unless the person to whom the property is issued or assigned has a reasonable expectation of privacy therein at the time of the search." *Id.* MIL. R. EVID. 314(d). Although privatized housing is not government property (*see infra* sec. III), under MRE 314(d) even government housing quarters assigned to military members cannot be searched without probable because all such housing occupants clearly have a reasonable expectation of privacy in such living quarters. Such quarters are easily distinguished from barracks. *See infra* sec. VI.B. Additionally, the hypothetical fact pattern eliminates any issue of consent. If SSG Brown voluntarily consented to the search of his quarters, or his spouse was present to consent to a search, then a non-probable cause search is authorized under MRE 314(e). Since SSG Brown was apprehended *outside* his quarters and no one was home in his quarters, there are absolutely no MRE 314(g) circumstances authorizing a search incident to lawful apprehension of any area *inside* his quarters. *See* MCM, *supra* note 3, MIL. R. EVID. 314(g)(2) ("A search may be conducted for weapons and destructible evidence, in the area within the immediate control of a person who has been apprehended."); MCM, *supra* note 3, MIL. R. EVID. 314(g)(3) ("When an apprehension takes place at a location in which other persons might be present who might endanger those conducting the apprehension . . . a reasonable examination may be made of the general area in which such other persons might be located.").

Within MRE 315(d) probable cause searches, there also could be numerous issues that are not addressed in this article. The hypothetical fact pattern assumes the garrison commander is the proper authority who, if he controlled the property, could authorize the search (MRE 315(d)(1)). Next, the law enforcement officials have supplied the commander with the proper basis to make a probable cause determination (MRE 315(f)). And finally, there are no exigent circumstances that require immediate entry into SSG Brown's quarters such that an exception to the search authorization requirement applies (MRE 315(g)).

5. This article does not differentiate between a commander's authority under MRE 315(d)(1) and a military judge's or military magistrate's under MRE 315(d)(2). All must be "impartial" (MRE 315(d)) and all have the same scope of authorization (MRE 315(c)). *See also* U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 9-7 (20 Aug. 1999).

6. *See* MCM, *supra* note 3, MIL. R. EVID. 315(d)(1).

7. *See* National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186 (codified as amended at 10 U.S.C. §§ 2871-2885 (2000). Title 10 U.S.C. §§ 2871-2885 is commonly referred to as the Military Housing Privatization Initiative (MHPI), the phrase used in tit. XXVIII, subtit. A, Pub. L. No. 104-106. *See* H.R. REP. NO. 104-450, at 2801 (1996).

commander's authority to issue a search authorization for evidence in a privatized housing area. Section III reviews the Military Housing Privatization Initiative (MHPI), a pilot program started in 1996 to improve the quality of housing for military families.[9] Section III details the history of the legislation, the status of the housing privatization projects throughout the military, and the future of military housing. The MHPI is silent on the issue of a commander's authority to authorize searches within the privatized housing areas.[10] In particular, Section III reviews the Army's first housing privatization project and some of the legal issues of which it is associated. The government has a legal right to enter contracts,[11] but can the government, through a lease between a military tenant and a private landlord, require to military member to contract away the right to be free from an unreasonable search?

Section IV reviews sources and types of federal jurisdiction and what impact, if any, they have on the MHPI and a commander's control over the

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8. *See* U.S. CONST. amend. IV. ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.").

9. *See* 10 U.S.C. §§ 2871-2885. Initially, the MHPI, signed into law by President Bill Clinton on 11 February 1996, began as a five-year pilot program scheduled to expire on Feb. 10, 2001. *Id.* § 2885; *see also The Privatization of Military Housing*, ACQWeb, Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics, 1, *at* http://www.defenselink.mil/acq/installation/hrso/about.htm [hereinafter ACQWeb Privatization]. (The website is no longer active and all archived files are on file with author.) The new website is www.acq.osd.mil/housing/mhpi (last visited Nov. 1, 2004) [hereinafter ACQWeb MHP]. The MHPI was expanded past its expiration date of 10 Feb. 2001 on two occasions: first, in 2000, it was extended to 31 Dec. 2004, and then in 2001, it was extended until 31 Dec. 2012. *See* National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398, 114 Stat. 1654 (codified as amended at 10 U.S.C. § 2885 (2000)); National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, 115 Stat. 1306 (codified as amended at 10 U.S.C. § 2885 (2001)).

10. *See* 10 U.S.C. §§ 2801-2885. Within Title 10 of the United States, Subtitle A (General Military Law), Part IV (Service, Supply, and Procurement), Chapter 169 (Military Construction and Military Family Housing) § 2801, contains four subchapters: subchapter I (Military Construction) § 2801-15; subchapter II (Military Family Housing) §§ 2821-37; subchapter III (Administration of Military Construction and Military Family Housing) §§ 2851-68; and subchapter IV (Alternative Authority for Acquisition and Improvement of Military Housing) §§ 2871-85. Not one statutory section within Chapter 169 addresses the issues of jurisdiction, a commander's control over conveyed property, or the narrow issue of a commander's authority to authorize searches within privatized housing areas. Exhaustive computer database searches of the *Congressional Record* and testimony leading to the enactment of the statute failed to disclose any floor debate on the topics.

leased or conveyed land. Congress, not the executive branch, has full power over federal land through the Property Clause of the Constitution.[12] Yet, the Supreme Court has found that power can be delegated so that commanders have full control over their installations for all purposes to include maintenance of law and order.[13] Section V reviews the commander's law enforcement authority on and off the installation and how this would and should logically extend to privatized housing areas.

Because MHPI is still in its early stages, there are no reported cases where a commander's authority to allow searches in privatized housing areas has been challenged.[14] Section VI reviews the cases in areas most analogous to privatized housing, primarily cases associated with MRE 315(d)(1) and a commander's authority to issue probable cause search authorizations.[15] For search authorization purposes, the law is clear that a commander has full control over on post government-owned quarters and he no control over off post privately-owned quarters.[16] Where does privatized housing, specifically designed to mirror off post civilian communities, fall within the spectrum of cases? For comparative purposes, this section reviews both military court and federal civilian court decisions on the commander's authority to authorize searches of both government and

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11. *See* United States v. Tingey, 30 U.S. (5 Pet.) 115 (1831). The Supreme Court considered whether the United States had the right to enter into a contract. *See id.* at 125. The case arose when a Navy purser signed a $10,000 bond and thus entered into a contract with the defendant on behalf of the Navy. *See id.* The purser did not pay Tingey, a surety of the purser, the $10,000 when the bond became due and payable. *See id.* The defendant filed suit against the Navy of the United States. *See id.* at 125-26. The Supreme Court held the United States, as a general right of its sovereignty, may within its constitutional powers, enter into contracts not prohibited by law as an appropriate exercise of those powers. *See id.* at 128. Additionally, statutes (the Annual DOD Authorization and Appropriations Acts) and regulations (the Federal Acquisition Regulation) authorize the United States to enter into contracts. *See* CONTRACT & FISCAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, 50TH GRADUATE COURSE DESKBOOK vol. 1, at 3-5 to 3-7 (2001-2002).

12. *See infra* note 114 (providing the text of the Property Clause of the Constitution).

13. *See infra* notes 126-128 (discussing United States v. Grimaud, 220 U.S. 506 (1911)).

14. This information is based on research of military courts' databases through October 2004.

15. While thousands of cases and numerous treatises address the general area of unlawful searches, this article narrowly focuses on MRE 315(d)(1). Certain assumptions must be made for this analysis to remain focused: (1) the commander has been provided with sufficient information to make a probable cause determination pursuant to MRE 315(f)(2), and (2) there are no exigent circumstances present to negate the requirement for a search authorization pursuant to MRE 315(g). *See* MCM, *supra* note 3, MIL. R. EVID. 315(d)(1), (f)(2), and (g).

16. *See infra* sec. VI.B for a detailed discussion of this issue.

privately-owned property, whether occupied by service members or civilians, both on and off the installation.

Section VII reviews the two basic arguments for and against a commander's authority to allow probable cause searches in privatized housing areas. The argument for such searches is that privatized housing is on the installation so the commander retains control over the property necessary to satisfy the requirements of MRE 315(d)(1). But does he? The counter-argument is that when the government conveys its land to a private developer it relinquishes control over the property and with it the commander's requisite authority to permit an MRE 315(d)(1) search. But when a commander gives up control of his housing operation for the primary purpose of increasing the quality of military housing, has the commander also given up control for the purpose of searching the property?

Two things are certain: privatization is the present and future of military housing, and the law is silent on the issue addressed by this article. Until legislation clearly defines the law in this area, it may take a smoking gun to raise the issue to a level that answers the question: Does a commander "control" the privatized housing area and thus retain authority to authorize MRE 315(d)(1) searches? Finally, Section VII concludes with a proposed amendment to MRE 315(c)(3) specifically including privatized housing as property within military control.

III. Privatized Housing

> *Is there a program where by we could enter into an agreement with realtors off post to turn over our on-post housing and let our civilian partners run it, as well as build additional housing?*[17]

A. Here Today, and Not Gone Tomorrow

Privatized housing, that is housing on military installations owned by private developers and rented by service members, is here to stay. As the number of privatized housing units increase, the number of government-owned housing units will decrease. The Department of Defense (DoD)

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17. General Dennis Reimer, Address to the Colorado Springs Chamber of Commerce (Jan. 10, 1995) (transcript *available at* http://www.carson.army.mil/RCI/RCI%20History/rci_history.htm (last visited Oct. 25, 2004)) [hereinafter Reimer Speech]; *see infra* notes 82-84 and accompanying text (providing a detailed discussion of General Reimer's speech).

owns approximately 300,000 military family housing units.[18] Prior to 1996, there were other housing initiatives similar to privatized housing, but they all failed.[19] In 1996, the initial plan called for 4,000 units to be privatized[20] with a stated goal of doubling the number of privatized units to 8,000 by 1997.[21] By 1998, there were 18,000 privatized units[22] and through 2001, over 90,000 units,[23] were planned for transition to privatized units. As of November 2004, there were over 180,000, or approximately 60% of the 300,000 government-owned housing units in various stages of planning, solicitation, and execution.[24] By 2010, the DoD self-imposed goal is to improve the quality of all military family housing units using privatization as one of primary tools to meets its objective.[25] With millions of dollars being used to implement these projects[26] at major installations across the United States[27] and the recent extension of the program through 2012,[28] privatized housing is here to stay. Another fact pointing to the deep entrenchment of privatized housing is that of the four initial projects,[29] two were for 50-year leases.[30]

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18. *See* Daniel H. Else, *Military Housing Privatization Initiative: Background and Issues*, CRS Report for Congress, CONG. RES. SERV., July 2, 2001, at ii [hereinafter CRS Report on MHPI]; *see also* ACQWeb MHP, *supra* note 9, *at* http://www.acq.osd.mil/housing/mhpiref.htm (referencing Mr. Else's report).

19. *See infra* note 41 (discussing the three original government housing projects: Wherry Housing, Capehart Housing, and Section 801 and 802 Housing).

20. *See Congressional Testimony, Report to Congress, On the First Year of the Housing Revitalization Initiative*, Mar. 1997, ACQWeb MPH, Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics 1, *at* http://www.acq.osd.mil/housing/congrestest.htm (last visited Nov. 1, 2004) [hereinafter ACQWeb First Year Report to Congress].

21. *See id.* at 5.

22. *See Congressional Testimony, Report to Congress, On the Second Year of the Housing Revitalization Initiative*, Mar. 1998, ACQWeb MHP, Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics, *at* http://www.acq.osd.mil/housing/congrestest.htm (last visited Nov. 1, 2004) [hereinafter ACQWeb Second Year Report to Congress].

23. *Project List, Department of Defense/Military Housing Privatization Initiative, October 2001 Report*, ACQWeb, Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics, *at* http://www.defenselink.mil/acq/installation/hrso/docs/octreport.htm (last visited Feb. 18, 2002) [hereinafter ACQWeb October 2001 Project List] (on file with author).

B. The Housing Problem, and Its Solution

Before 1996, DoD used two methods to house military members and their families, commercial and government-owned housing.[31] The primary method, used for about two-thirds of the families, has been to rely on

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24. The actual figure of 180,581 units in one of the three stages of the privatization process (award, solicitation, or planning) is derived from a combination of two sources, the ACQWeb MPH November 2004 Projects Awarded, Projects Pending, and Projects Planned lists at http://www.acq.osd.mil/housing/housingprojects.htm [hereinafter ACQWeb November 2004 MPH Lists] and the U.S. Army's Residential Communities Initiatives (RCI) Web site *at* http://rci.army.mil [hereinafter RCI Web site]. The RCI Web site, current through August 2004, lists all of the Army's privatization projects. The ACQWeb site lists all four services' projects current through November 2004. All of the privatization data and statistics in this section and the Tables in Appendix A comes from the ACQWeb site for all Air Force, Navy, and Marine privatization projects and from the RCI Web site for all Army projects.

Through August 2004, the RCI Web site lists thirty-five Army projects encompassing 84,253 units. *See* RCI Web site, Program Overview 11 (Aug. 2004), *at http://www.rci.army.mil/RFQ/program_summary_aug_04.ppt* [hereinafter RCI August 2004 Program Summary]. By comparison, the ACQWeb site lists twenty-eight Army projects encompassing 71,325 units. *See* ACQWeb November 2004 MPH Lists. For continuity purposes, the statistics in the charts below will use the ACQWeb November 2004 statistics.

25. *See* CRS Report on MHPI, *supra* note 18, at 15.

26. *See* ACQWeb First Year Report to Congress, *supra* note 20, at 6. In Fiscal Year 1996, approximately $3 million of appropriated funds were used for administrative costs to develop a methodology for applying the new authorities to the privatized housing projects. *See id.*

27. The first four privatized housing projects in order were: (1) Naval Air Station, Corpus Christi, Texas, 404 units, July 1996; (2) Naval Station, Everett, Washington, 185 units, March 1997 (the Everett I project was followed by the Everett II project for 288 units in December 2000); (3) Lackland Air Force Base, Texas, 420 units, August 1998; and (4) Fort Carson, Colorado, 2663 units, September 1999. *See id.* at 3-5; *see also* CRS Report on MHPI, *supra* note 18, at 16; ACQWeb November 2004 MPH Lists, *supra* note 24, at 1.

28. As congressional confidence in the program has grown, the MHPI has been extended twice, first from 2001 to 2004 and then from 2004 to 2012. *See* 10 U.S.C. § 2885 amendments: the Act of Oct. 30, 2000 substituted "December 31, 2004" for "February 10, 2001" and the Act of Dec. 28, 2001 substituted "2012" for "2004." As a result of the amendments to the 1996 act, the original expiration date of 10 February 2001 has been extended to 31 Dec. 2012. *See id.* § 2885.

29. *See supra* note 27 (listing the first four privatized housing projects).

30. *See* ACQWeb First Year Report to Congress, *supra* note 20, at 4. The Lackland Air Force Base, Texas project for the privatization of 420 units included a government lease of ninety-six acres of land to a private developer for a period of fifty years (through 2048). *See id.* The Fort Carson, Colorado privatization project for 2663 units includes a fifty-year lease with renewable option of twenty-five years for all of the land associated with the project and an outright conveyance of the existing structures to be revitalized. *See id.*

31. *See* CRS Report on MHPI, *supra* note 18, at 1.

commercial, i.e. off-post, privately owned housing. Members either buy their own home, or rent on the commercial market in areas surrounding military installations. Members living off-post receive a housing allowance to help defray expenses.[32] While off-post housing has problems of its own, such as affordability,[33] this article focuses on problems associated with government-owned housing which lead to a third method of housing military members, the Military Housing Privatization Initiative (MHPI).[34]

Congress authorized the MHPI as a pilot program in 1996 to increase the quality of military housing.[35] Approximately 300,000 military families live in government-owned housing on and off base.[36] Between 180,000 and 200,000 military families, or 60-66%, live in inadequate government quarters.[37] Whether the quarters are too old,[38] too small, or are simply falling apart, the fact is these sub-standard quarters directly affect the families' quality of life. "[T]he quality of military housing has a direct bearing on the retention of a proficient, capable volunteer career military force." [39] The DoD reported to Congress that it would take 30 years and $16 billion to bring existing government housing needs up to standard using traditional contracting and construction methods.[40] Although not the first attempt to correct the inadequate military housing situation,[41] the

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32. *See id.*

33. *See* ACQWeb Privatization, *supra* note 9, at 2-3. Because of the limited number of government-owned housing units available at military installations (300,000 for an active duty military force of 1.5 million), military members are forced to live in the local communities surrounding the installations. Of the 1.2 million enlisted personnel, seventy-five percent are in the rank of E3 through E6. *See Tenant Profile*, ACQWeb, Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics, 1, *at* http://www.defenselink.mil/acq/installation/hrso/tenant.htm (last visited Jan. 31, 2002) [hereinafter ACQWeb Tenant Profile] (on file with author). At the lower end of the military pay scale, these enlisted personnel forced to live off post have difficulty finding quality, affordable housing within reasonable commuting distances of their installations. *See* ACQWeb Privatization, *supra* note 9, at 3.

34. *See supra* notes 7 and 9 (discussing the legislative history of the MPHI).

35. *See* CRS Report on MHPI, *supra* note 18, at 5 (beginning as a five-year pilot program within a ten-year plan to resolve the general military housing problem).

36. *See id.* at ii. Due to insufficient maintenance, lack of renovation, and modernization, the majority of government quarters have deteriorated over the past thirty years. *See* ACQWeb Privatization, *supra* note 9, at 1.

37. *See* CRS Report on MHPI, *supra* note 18, at 1 (reporting an estimated 180,000 inadequate government-owned quarters); ACQWeb First Year Report to Congress, *supra* note 20, at 1 (reporting an estimated 200,000 inadequate quarters).

38. *See* ACQWeb Tenant Profile, *supra* note 33, at 2 ("On-base housing has an average age of 33 years with one-quarter of this housing over 40 years old."); *see also infra* note 41 for a discussion of Capehart/Wherry Housing constructed from 1949-62.

MHPI was the most powerful authority provided by Congress to DoD to

39. CRS Report on MHPI, *supra* note 18, at 3. On 8 March 2001, each of the military services senior enlisted members (the Sergeant Major of the Army, the Master Chief Petty Officer of the Navy, the Sergeant Major of the Marine Corps, and the Chief Master Sergeant of the Air Force) testified before the House Appropriations Committee's Subcommittee on Military Construction that quality of housing for service members was a major concern. The common theme stressed by all four senior enlisted members was that quality of life of military families left at home "has a direct and dramatic effect on the numbers and quality of those who decide to remain for a full 20-plus active duty career." *Id.* at 2.

40. *See id.* at 1; *see also* ACQWeb Privatization, *supra* note 9, at 1 (estimating that the solution to housing problems using traditional contracting and construction methods could take between 30-40 years and up to $30 billion).

41. Three prior housing construction and private sector initiatives all failed due to various reasons: (1) Wherry Housing, (2) Capehart Housing, and (3) Section 801 and 802 Housing.

(a) From 1949 to 1955, Wherry Housing (named for Senator Kenneth Spicer Wherry of Nebraska) (Pub. L. No. 81-221 of 1949) authorized the military services to solicit plans for housing from private builders. The lowest bidder would be awarded a contract to construct homes on government-controlled land for rental to military personnel. The contractor would obtain private financing for a mortgage and retain title to the real property and rented housing. Military members retained their housing allowances and paid rent to the private developer who then paid the mortgage. "[C]ongressional concerns with 'windfall' profits accruing to private developers" led to Wherry Housing's effective termination in 1955. Approximately 84,000 Wherry units were built in the early 1950's. *See* CRS Report on MHPI, *supra* note 18, at 3-4.

(b) From 1957 to 1962, Capehart Housing (named for Senator Homer E. Capehart of Indiana) [Housing Amendments of Aug. 11, 1955 to the National Housing Act of 1934 (codified at 12 U.S.C. § 1748a, repealed by Act of July 27, 1962, Pub. L. No. 87-554, 76 Stat. 237] authorized private developers with privately obtained financing to build on government-controlled land. Unlike Wherry Housing, the title was turned over to the government and members forfeited their entire housing allowance. As a result, the Capehart Housing was government-owned and DoD made a single mortgage payment for a Capehart project to the private mortgager. Approximately 115,000 Capehart units were built. In 1957, the privately held Wherry units were purchased by the government and these housing projects are now commonly referred to as Capehart/Wherry housing. *See* CRS Report on MHPI, *supra* note 18, at 3-4.

rectify its housing problems.

C. The Means

The National Defense Authorization Act for Fiscal Year 1996[42] provided DoD with a variety of authorities to obtain private sector financing to improve housing for military members. The authorities, used individually, or in combination, include:[43]

1. Guarantees, both loan and rental;[44]
2. Conveyance/leasing of existing property and facilities;[45]
3. Differential Lease payments;[46]
4. Investments, both limited partnerships and stock/bond ownership;[47] and

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41. (cont.)

(c) Section 801 and Section 802 Housing was created by Title VII of the Military Construction Act of 1984 (Pub. L. No. 98-115) and this type of housing still exists today, however, its use is highly discouraged. These laws were passed to encourage private construction of military housing on and near military installations for use by military personnel. Section 801 is essentially a build-to-lease agreement with a local property developer and Section 802 encourages to construction of rental property by providing a rental guarantee. *See id.* at 4. Of the 12 alternative authorizations that are part of the MHPI, Build to Lease (similar to Section 801 Housing) and Rental Guarantee (similar to Section 802 Housing) are ranked 11 and 12, respectively, as the two worst-ranked methods to employ based on their highest budget scores. *See id.* at 12, tbl. 1, Alternative Authorizations Ranked by Impact on Budget. *See also infra* notes 66-67. For a detailed history of military housing *see* Dr. William C. Baldwin, *Four Housing Privatization Programs: A History of the Wherry, Capehart, Section 801, and Section 802 Family Housing Programs in the Army*, U.S. Army Corps of Engineers, Office of History (Oct. 1996), at http://www.acq.osd.mil/housing/docs/four.htm (last visited Nov. 10, 2004).

42. 10 U.S.C. § 2801-2885 (1996).

43. *See* ACQWeb Privatization, *supra* note 9, at 2.

44. *See* ACQWeb, Second Year Report to Congress, *supra* note 22, at 5 (authorizing the DoD to guarantee mortgage payments or provide guarantees for mortgage insurance); *see also* 10 U.S.C. § 2873 (addressing direct loans and loan guarantees).

45. *See* ACQWeb, Second Year Report to Congress, *supra* note 22, at 5-6 (allowing the DoD to "enter into contracts for the lease of family housing units to be constructed by the private sector"); *see also* 10 U.S.C. § 2874 (addressing leasing of housing to be constructed).

5. Direct Loans.[48]

Armed with new legislation, the Secretary of Defense created a joint Housing Revitalization Support Office (HRSO) staffed with 16 full-time housing and real estate experts from each of the four military services.[49] The HRSO's criteria and procedures for determining sites eligible for privatization are extremely complex;[50] however, the simple fact remains that if an installation's housing is in dire need of revitalization, it is likely to make the project list.[51]

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46. *See* ACQWeb, Second Year Report to Congress, *supra* note 22, at 6 (noting that the DoD may pay an amount in addition to the rent paid by the servicemember to encourage the private lessor to make its housing available to servicemenbers); *see also* 10 U.S.C. § 2877 (addressing differential lease payments).

47. *See* ACQWeb, Second Year Report to Congress, *supra* note 22, at 6. The DoD may invest in non-governmental entities involved in the acquisition or construction projects. The investment may be in the form of a limited partnership or the purchase of stocks or bonds or any combination thereof. There is no minimum investment, but there is a maximum of 33 1/3% of the capital cost of the project. "[DoD] also has the authority to convey the land or buildings as all or part of its investment, in which case its total contribution, including the value of the land and facilities may not exceed 45% of the total capital cost of the project." *Id.*; *see also* 10 U.S.C. § 2875 (addressing investments).

48. *See* ACQWeb, Second Year Report to Congress, *supra* note 22, at 6 ("[DoD] can offer a direct loan to a private developer to provide funds for the acquisition or construction of housing that will be available to military members."); *see also* 10 U.S.C. § 2873 (addressing direct loans and loan guarantees).

49. *See* ACQWeb First Year Report to Congress, *supra* note 20, at 2 (noting that during HRSO's first year of operation, it set policies, procedures and guidelines on how projects would be selected and how they would be completed from inception to completion).

50. *See id.* The HRSO has protocols to screen financial feasibility of projects at potential privatization sites, protocols for the collection of site specific data, and criteria to determine which authorities could be used most efficiently at each site. In addition to the full-time staff of experts, consultants are hired to advise on areas of real estate development and finance. Once the military service Department approves a project, it must also be approved by the Secretary of Defense. Upon final approval for a project, the service Department must then prepare a Request for Proposal and notify Congress of intent to proceed with the project. *See id.*

51. Through November 2004, there were ninety-five total projects encompassing 180,581 units: thirty-nine projects were awarded for 74,153 units, thirty-six projects were in the solicitation phase for 62,254 units, and twenty projects were in the planning phase for 34,174 units. *See* ACQWeb November 2004 MPH Lists, *supra* note 24, at 1-3.

D. The Methods

Additionally, the MHPI "toolbox" includes twelve alternative authorizations for project managers to select from when initiating a project.[52] Because Congress requires individual project reports and a yearly report on the progress of the MHPI,[53] one of the key factors for ultimate approval of the project rests with the impact the project will have on the agency's budget.[54] The following twelve methods are ranked from best (no impact on the agency's budget) to worst (high impact):[55]

1. Conveyance or lease of land or units;[56]

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52. *See* CRS Report on MHPI, *supra* note 18, at 4-5.

53. *See* 10 U.S.C. § 2884. Project reports for each contract for acquisition or construction of family housing and each conveyance or lease under the MHPI must be provided to the appropriate congressional committee by the Secretary of Defense not later thirty days before the contract solicitation is issued or the conveyance or lease is offered. The reports must include the method and justification for the United States' participation in the project. *See id.* § 2884(a). The Secretary of Defense must also provide annual reports to Congress in support of the budget detailing the expenditures and receipts of funds appropriated for the MHPI. *See id.* § 2884(b).

54. Each project and the methods chosen to implement that project goes through a complex process of "Budget Scoring" implemented by the Office of Management and Budget (OMB). *See* CRS Report on MHPI, *supra* note 18, at 9. Budget scoring is a method of scorekeeping to track the success of projects and incorporate lessons learned for future projects. *See id.* n.12. Budget scoring is a percentage, from 0% to 100%, of the funds from agency's budget that it must allocate to the project in a fiscal year. No impact on an agency's budget (or 0%) is the best and High impact (or 100%) is the worst. In between, impact is categorized as Low (between 4% to 7%) and Moderate (a 30% to 70% impact range). Budget impact is scored as follows: if an agency has a $1 million budget and a project costs $1 million, then the amount of its own budget the agency has to allocate to the project determines the budget score. For example, if the agency does not have to use any of its own funds (0%) then it receives the best possible budget score of 0%. If the agency has to allocate $100,000 (or 10% of its $1 million budget) of its own funds for the project, then the 10% budget score is considered Low impact. If the agency has to use $500,000 of its own funds, then it receives a 50% budget score for the Moderate budget impact. If the agency has to fund the entire project with its own funds, then it receives the worst budget score of 100% within the High impact category. *See id.* at 9; *see also* The Omnibus Budget Reconciliation Act of 1990 (Pub. L. 101-508) (as interpreted by OMB Circular A-11 and MHPI Guidelines issued by the OMB on 25 June 1997). Only the first twenty privatization projects were scored under the 1997 guidelines that were adjusted based on lessons learned. *See* CRS Report on MHPI, *supra* note 18, at n.12.

55. *See id.* at 12, tbl. 1 (Alternative Authorizations Ranked by Impact on Budget).

56. *See id.* In terms of Budget Scoring, conveyance or lease of land or units is the best method because it has zero impact on the budget. *See id.* The government may transfer title of its property to a private entity that will secure private financing for the project. *See id.* at 5.

2. Unit size and type;[57]
3. Ancillary support facilities;[58]
4. Payment of rent by allotment;[59]
5. Loan guarantees;[60]
6. Direct loan;[61]
7. Differential lease payments;[62]
8. Investment (joint venture);[63]
9. Interim leases;[64]
10. Assignment of members (tenant guarantee);[65]
11. Build to lease;[66] and
12. Rental guarantee.[67]

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57. *See id.* at 12, tbl. 1. By relaxing federal specifications for housing construction, local builders can construct housing pursuant to familiar local building codes resulting in more cost-effective construction. *See id.* This method also has no impact on the budget. *See id.* at 12.

58. *See id.* at 12, tbl. 1. To enhance attractiveness of the overall project, contractors can include support facilities such as child care centers and dining facilities as part of the housing development. *See id.* at 5. These added features improve the military members' quality of life with no impact on the budget. *See id.* at 12.

59. *See id.* The government guarantees the private landlord will receive the military members' rent payments through electronic funds transfer. *See id.* at 5. This guarantees cash flow to the landlord and reduces the uncertainty of receiving rent payments. Again, there is no impact on the budget. *See id.* at 12.

60. *See id.* The government can guarantee up to 80% of the private developer's private loan. *See id.* at 5. With federal backing, banks offer lower interest rates. Based on the low probability of contractor default in this scenario, the OMB rates this as Low impact on the budget (4-7%). *See id.* at 12.

61. *See id.* Here the government makes a direct loan to the contractor. The budget impact score for this method is categorized as Moderate, ranging from 30-70% impact on the agency's budget. *See id.*

62. *See id.* With a Differential Lease Payment, the government agrees to pay the landlord the differential between the BAH paid to the service member and the local market rents. *See id.* at 5. This method scores Moderate to High on the budget impact chart as this method falls within the bottom half of the chart (number 7 of 12). *See id.* at 12.

63. *See id.* In a Joint Venture project, the government can take an equity stake in the housing project. *See id.* at 5. This is another Moderate to High budget impact method and the agency could finance 100% of the project for the highest possible budget score. *See id.* at 12.

64. *See id.* With Interim Leasing agreements, the government may lease private housing units until the privatization project is completed. This method also rates as Moderate to High because of the requirement to make the interim lease payments. *See id.*

65. *See id.* This is a tenant guarantee where service members are assigned to housing in a particular project they may not otherwise choose to live in. *See id.* at 5. This arrangement forces an above market occupancy rate and has a High impact on the budget. *See id.* at 12.

These twelve methods can be used individually, or in any combination that the project manager deems will be most advantageous to the government. While the last four methods (#9 through #12) have not been utilized by any privatization projects due to high budget impact scores, the first four methods (#1 through #4) have been used in a number of projects.[68] In fact, two of the four original privatization projects, Lackland Air Force Base (AFB), Texas and Fort Carson, Colorado[69] each combined the first four methods. Both projects included 50-year leases of installation land to private developers, houses built to local building code standards, ancillary support facilities to enhance the communities, and the military members' rental payments are made to the private landlord through allotment.[70]

E. The Projects

Since the initial four projects were awarded on what turned out to be a yearly basis from 1996 through 1999,[71] the next eleven projects were awarded over a sixteen-month period from September 2000 through December 2001,[72] and twenty-one more were in solicitation for 2002.[73] The projects are tracked and categorized in three distinct phases: Projects Awarded, Projects in Solicitation, and Planned Projects.[74] All services

66. *See id.* Build to Lease is similar to Section 801 Housing where the government contracts for private construction of a housing project and then the government leases the units. *See id.*; *see also supra* note 41 (discussing Section 801 housing).

67. *See* CRS Report on MHPI, *supra* note 18, at 12. The Rental Guarantee arrangement is similar to Section 802 Housing where the government guarantees a minimum occupancy rate or rental income for a housing project. *See id.*; *see also supra* note 41 (discussing Section 802 housing).

68. *See* CRS Report on MHPI, *supra* note 18, at 4-5. "Alternative Authorizations Ranked by Impact on Budget" reflects the fact that several individual privatization projects combined many of the authorization methods. *See id.* at 12, tbl. 1.

69. *See supra* note 27 (discussing the first four privatized housing projects); CRS Report on MHPI, *supra* note 18, at app. A, tbl 1.

70. *See* CRS Report on MHPI, *supra* note 18, at 12.

71. *See id.* at app. A, tbl. 1.

72. *See id.* at 16, tbl. 2.

73. *See id.*; ACQWeb October 2001 Project List, *supra* note 23, at 1-2 (listing twelve Air Force, Navy, and Marine projects in the solicitation phase for 2002); RCI August 2004 Program Summary, *supra* note 24, at 11 (listing nine Army projects in the solicitation phase for 2002).

74. *See* CRS Report on MHPI, *supra* note 18, at 16, tbl. 2; ACQWeb October 2001 Project List, *supra* note 23, at 1-3.

have major projects in some phase of the privatization process, whether awarded, in solicitation or planned.[75]

With over 180,000 units somewhere in the MHPI process[76] as of late 2004, DoD has accounted for the eventual privatization of 60% of all military housing[77] just eight years into the program.[78] This aggressive attack of the problem has DoD well on its way to meeting its stated goal of improving military family housing by 2010.[79]

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75. The following chart details the largest projects for each of the four services:

	Facility	Units	Projects Status
1.	Marine Corps Base Camp Pendleton (Phases 1-4), CA (Phase 2 includes some units at Quantico, VA and Phase 3 includes some units at Yuma, AZ	10,644	Award (Phases 1-3) & Planning (Phase 4)
2.	Naval Complex San Diego (Phase 1 and Phase 2), CA	9133	Award (Phases 1 and 2) & Planning (Phase 3)
3.	Fort Shafter/Schafter Barracks, Hawaii (Army)	7364	Solicitation
4.	Offutt Air Force Base, Nebraska	2255	Solicitation

See CRS Report on MHPI, *supra* note 18, at 16-17. Marine Corps Base Camp Pendleton (Phase 1) for 712 units was awarded in November 2000; MCB Camp Pendleton and MCB Quantico, VA (Phase 2) was awarded in September 2003 for 4534 units; MCB Camp Pendleton and MCB Yuma, AZ was awarded in October 2004 for 897 units; and MCB Camp Pendleton is currently in the planning phase for 4501 units for a completed project total of 10,644 units. *See* ACQWeb November 2004 MPH Lists, *supra* note 24. NC San Diego (Phase 1) for 3248 units was awarded in August 2001, NC San Diego (Phase 2) was awarded in May 2003 for 3217 units, and NC San Diego (Phase 3) is the planning phase for 2668 units for a completed project total of 9133 units. *See id.* The Fort Shafter/Schofield Barracks project was solicited in August 2002. *See id.* The Offutt AFB project was solicited in May 2003. *See id.*

76. There were 74,153 units in the Projects Awarded phase, 62,254 units in the Projects in Solicitation phase, and 34,174 units in the Planned Projects phase for a total of 180,581 units in the MHPI process. *See id.*

77. 180,581 units of the total 300,000 military family housing units. *See supra* note 36 and accompanying text.

78. The MHPI was signed into law on 11 Feb. 1996. *See supra* note 9 (discussing the enactment of MHPI).

F. Fort Carson, Colorado—The Army's First Privatization Project[80]

1. The Background

Ranking the Army projects by size, with 2663 units, Fort Carson is thirteenth on the list,[81] yet it was still chosen as the site for the Army's first privatization project. Maybe it was because of the following challenge

79. *See supra* notes 25-28 and accompanying text. The following chart reviews the projects by service:

Service	# of Projects	% of total	# of Units	% of total
Army	28	30%	71,325	40%
Air Force	40	42%	53,367	30%
Navy	17	18%	36,277	20%
Marines	10	10%	19,612	10%
Totals	95	100%	180,581	100%

See ACQWeb October 2001 Project List, *supra* note 24, at 1-3; RCI January 2002 Program Overview, *supra* note 24, at 1-2. The following chart breaks down the number of housing units per privatization project:

Units	0-1000	1001-2000	2001-3000	3001-4000	4001-5000	5001+	Total
Projects	38	26	13	8	5	5	95

One installation can have multiple projects, such as NS Everett I and NS Everett II, or an installation could have one "project" broken into phases. For purposes of this chart phases are considered separate projects. *See* CRS Report on MHPI, *supra* note 18, app. A, tbl. 6 (listing the installations with multiple projects, either by separate project or by phase). Of the thirty-eight projects in the "0-1000" category, the smallest is Picatinny Arsenal, New Jersey, with 116 units. *See* ACQWeb November 2004 MPH Lists, *supra* note 24, at 1. Of the five projects with over 5000 units, three are Army [Fort Shafter/Schofield Barracks, Hawaii (7634 units), Fort Hood, Texas (5912 units), and Fort Bragg, North Carolina (5580). *See id.* The Camp Pendleton Marine project (10,644 units) and San Diego Navy project (9133 units) are combined totals for more than multiple projects. *See supra* note 75 and accompanying chart (breaking down the individual projects).

80. Overall, Fort Carson, Colorado was the military's fourth privatization project under the MHPI, but it was the first for the Army. *See supra* note 27; *see also* CRS Report on MHPI, *supra* note 18, app. A, tbl. 1.

F. Fort Carson, Colorado—The Army's First Privatization Project[80]

1. The Background

Ranking the Army projects by size, with 2663 units, Fort Carson is thirteenth on the list,[81] yet it was still chosen as the site for the Army's first privatization project. Maybe it was because of the following challenge made in January 1995 (thirteen months before the MHPI was signed in to law) by General Dennis Reimer, who was the Commanding General, U.S. Army Forces Command at the time:[82]

> Installations like Fort Carson and communities like Colorado Springs need to work closer together and share core competencies. We are just touching the tip of the iceberg and there is a lot more that we can do if we are innovative. I have challenged Fort Carson to be the model for the Army and charged them with the responsibility of developing privatization initiatives to their full potential. I have no idea where this will lead, but I believe it can be a win-win situation. . . . We need some fresh thinking on this issue because it is an area we have to solve quickly.[83]

In what was apparently an uncanny vision of the future of military housing, General Reimer's comments to the Colorado Springs Chamber of Commerce were obviously taken very seriously. After the MHPI was signed into law in 1996, the personnel involved in Fort Carson project moved quickly in a complex area where they literally broke new ground on March 25, 2000.[84] The Fort Carson Residential Communities Initiative (RCI)[85] included a 50-year lease,[86] the complete renovation and modernization of the installation's existing 1823 units, all of which were over 30

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80. Overall, Fort Carson, Colorado was the military's fourth privatization project under the MHPI, but it was the first for the Army. *See supra* note 27; *see also* CRS Report on MHPI, *supra* note 18, app. A, tbl. 1.

81. *See* CRS Report on MHPI, *supra* note 18, app. A, tbl. 4; *see also* CRS Report on MHPI, *supra* note 18, app. A, tbl. 5 (listing, for the other services, the top projects by number of units).

82. General Dennis Reimer was promoted to four-star general in June 1991. He served as the Vice Chief of Staff, U.S. Army, Washington, D.C., from 1991-1993; Commanding General, U.S. Army Forces Command, Fort McPherson, Georgia, from 1993-95; and as the 33rd Chief of Staff of the U.S. Army from 20 June 1995 until he retired on 21 June 1999. *See* Biography of General Reimer *available at* http://www.army.mil/cmh-pg/books/cg&csa/Reimer-DJ.htm (last visited Oct. 24, 2004).

83. Reimer Speech, *supra* note 17. The Fort Carson housing privatization project is called the Residential Communities Initiative (RCI). The web page is available at http://www.carson.army.mil/RCI/index.htm.

years old,[87] and the concurrent construction of 840 new units.[88] The RCI project allowed the private developer to build to local building code standards, build additional amenities,[89] and collect rent through allotment.[90]

2. *Lessons Learned*

While all initial indicators are the Army's first privatization project is a huge success, there are many lessons to be taken from Fort Carson to apply to all future projects.[91] Based on the scope and complexity of this project, it is not surprising that many valuable lessons were learned.[92] From complex contract issues to the "Yard of the Month" program,[93] the RCI project documented everything.[94] Of DoD's first four privatization projects,[95] Fort Carson's more than doubled the other three combined[96] so

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84. The RCI Web site has a link to "Lessons Learned" which contains two briefings that report the lessons from the project. The first briefing is dated "22 March 2001" and the second one is "21 August 2001," the latter of which is available at http://www.carson.army.mil/RCI/Lessons%20Learned/2nd_briefing.htm [hereinafter RCI Lessons Learned]. The project status timeline is detailed as follows: Request for Proposal (RFP) (9 Sept. 1998); Contract Awarded (30 Sept. 1999); Contract Closing (23 Nov. 1999); Ground Breaking Ceremony (25 Mar. 2000); First New Home Complete (Dec. 2000); First Existing Home Renovated (Jan. 2001); New Construction Complete (Sept. 2004); and All Existing Units Renovated (Sept. 2005). *See id.* at 1-2. An original RFP went out in the fall of 1997, the bid closing was set for April 1998. Just before bid closing, there was a bid protest that resulted in a federal judge voiding the entire procurement. The second RFP went out in September 1998 with a bid closing date of 29 Jan. 1999. On 30 September 1999, the first ever Army family housing privatization project was awarded to the J.A. Jones Fort Carson Family Housing Limited Liability Corporation. *See id.* at 2.

85. *See* RCI Lessons Learned, *supra* note 84.

86. *See supra* note 30 (discussing Fort Carson's lease).

87. *See* Reimer Speech, *supra* note 17, at 2. In addition to the problem of aging housing, "[o]nly 17% of Fort Carson's soldiers lived on post, as compared to 29% for other FORSCOM installations. There are over 1500 families on the waiting list, with an average wait time of 3 to 24 months." *Id.*

88. *See id.* at 1.

89. *See* RCI Lessons Learned, *supra* note 84, at 1 (including such amenities as a "playground for every 50 units, generous landscaping, lawn irrigation systems, and extensive jogging and biking trials").

90. *See supra* note 59 (discussing guaranteed payment of rent).

91. *See generally* RCI Lessons Learned, *supra* note 84 (discussing the lessons learned from the Army's initial privatization project at Fort Carson).

it also not surprising that DoD closely tracked the project to enhance the overall MHPI program.[97]

3. Legal Issues—the Fort Carson Project

Fort Carson's project called for the renovation of existing homes and the concurrent construction of new homes.[98] In April 2000, five months after the RCI contract was signed[99] and months before any soldiers occupied the privatized housing,[100] the Deputy Staff Judge Advocate (DSJA) already recognized a potential issue: "Does the lease of the land and transfer of ownership of the quarters to a private contractor impact on the authority of the installation commander, military judge, and military magistrate to authorize searches in the quarters?"[101]

The DSJA's analysis focused on two critical points: (1) the opinion that the commander still "controls" the property,[102] and (2) the fact that the contract did not prohibit the authority to search.[103] The DSJA concluded, "[i]n my opinion, housing privatization does not change the legal basis for

92. The Fort Carson RCI lessons learned are broken into three categories: Pre-Award, Closing/Transition, and Post Award/Operations. Pre-Award lessons learned included areas that appear to have been costly oversights such as failure to determine the infrastructure upgrade requirements to common sense oversights as failure to keep the residents well informed about the program. Closing/Transition lessons learned included the recognition that more time was needed to accomplish the transition period and the acknowledgement that partnering was critical to success. Post Award/Operations proved to provide the most lessons learned and raised the most legal issues (discussed in sec. III.F.3., *infra*). *See id.* at 2. Many of the latter lessons learned are still being implemented and worked through, such as a commander's authority to authorize searches in privatized housing. *See infra* note 102 (discussing the search issues identified in the early lessons learned at Fort Carson).

93. *See* RCI Lessons Learned, *supra* note 84, at 2-3.

94. *See id.*

95. *See supra* note 27 and accompanying text; *see also* CRS Report on MHPI, *supra* note 18, at app. A, tbl. 1.

96. The NAS Corpus Christi/Kingsville I, Texas (404 units), NS Everett I, Washington (185 units), and Lackland AFB, Texas (420 units) projects total 1009 units compared to Fort Carson's 2663 units. *See* CRS Report on MHPI, *supra* note 18, at app. A, tbl 1.

97. *See supra* notes 20, 22 (discussing the ACQWeb First and Second Year Reports to Congress).

98. *See supra* notes 87-88 and accompanying text.

99. *See* RCI Lessons Learned, *supra* note 84. The contract closing took place on 23 November 1999. *See id.*

100. The first privatized homes were completed/renovated in December 2000/January 2001, respectively. *See id.*

authorizing searches in the privatized housing areas. To avoid any confusion concerning the issue, however, I recommend Fort Carson request a contract modification to make the Army's authority to authorize searches clear."[104]

It is unclear whether a commander "controls" privatized housing. There is no case law directly on point, and the legislation is silent on the issue.[105] The April 2000 Search MFR acknowledges there may be some confusion over a commander's authority to issue a search authorization in privatized housing,[106] but there is no doubt that the property remains under military control.[107] While acknowledging that legal memoranda are not binding, what is clear is there is certainly room for debate among legal

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101. Memorandum for Record by Lieutenant Colonel (LTC) Daniel K. Poling (unsigned), subject: Searches in Privatized Housing Areas on Fort Carson, para. 3a (5 Apr. 2000) [hereinafter Search MFR] (on file with author). Lieutenant Colonel Daniel K. Poling, then the DSJA of the Fort Carson OSJA, drafted this five-page memorandum. Major Michael Kramer, while a student in the 50th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, Charlottesville, Virginia, provided the memorandum to the author. Major Kramer was assigned to Fort Carson as a judge advocate from February 1999 to June 2001. In the Search MFR, the DSJA identified a second issue in addition to the one described in the text above. The second issue (with subparts) was:

> Does the privatization of Fort Carson's housing impact on other areas involving access to quarters? For example, does privatization affect the ability of the installation commander to invite off-post social welfare agencies to investigate cases such as child neglect? Does privatization affect command authority to conduct inspections of quarters?

Id. para. 3b.

102. *See id.* para. 7. In a detailed discussion, the Search MFR outlined the case law on the issue of whether the privatized housing on the installation is still "property under military control." *See id.* All of the following cases are discussed in detail in sect. VI.B. *infra*: United States v. Brown, 784 F.2d 1033, 1036-37 (10th Cir. 1986) (upholding a search of government quarters even though the quarters were occupied by civilians); Saylor v. United States, 374 F.2d 894, 900-01 (Ct. Cl. 1967) (finding a commander in Japan lacked authority to authorize search on post quarters occupied by a civilian employee); United States v. Grisby, 335 F.2d 652, 655 (4th Cir. 1964) (holding that government quarters on a military installation are under military control and thus subject to search pursuant to a military search authorization); United States v. Reppert, 76 F. Supp. 2d 185, 188 (D. Conn. 1999) (deciding that when the Navy leased property in the civilian community to house sailors, and even though the property was off-post, it was under military control); United States v. Moreno, 23 M.J. 622, 624 (A.F.C.M.R. 1986) (upholding the search of an on-post credit union, noting that a commander, judge, or magistrate could authorize searches of credit unions, commercial banks, or other nonmilitary activities); and United States v. Rogers, 388 F. Supp. 298, 301-02 (E.D. Va. 1975) (providing that a commander could properly order search of quarters assigned to civilian on Naval base).

scholars – a debate that would ultimately have to be settled by the courts. The issue of control is explored in greater detail in Section VI below.

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103. *See id.* para. 5. In reviewing the RCI Contract, the DSJA noted that the contract "makes no specific mention of authority to authorize searches. Under the contract, the leased area will remain part of Fort Carson and remain under exclusive federal jurisdiction." *Id.* "The contract also provides that police and fire protection will be provided by the Government." *Id.* The DSJA then cited the full text of paragraph 7 of the contract:

> The use and occupation of the Premises shall be subject to the general supervision and approval of the Fort Carson Installation Commander. hereinafter referred to as "said officer," and to such rules and regulations as may be prescribed from time to time by said officer covering the operation, security, access, or other aspects of the mission of Fort Carson.

Id.

The DSJA concluded this section by stating:

> [t]hese provisions strongly suggest the commander, military judge, and magistrate retain search authorization authority for the leased quarters. The maintenance of exclusive federal jurisdiction, the provision of police services, and the provision providing for general supervision suggest the military has reserved its police and supervisory powers over the area, to include authorizing searches.

Id.

104. *Id.* para. 2. The DSJA recommended the following contract modification as a solution:

> In recognition of the Army's need to insure security, military fitness, and good order and discipline, and the fact that the premises remain on a military installation of exclusive federal jurisdiction, the contractor agrees that all areas leased and/or owned by the contractor on Fort Carson under this contract are within military control and that the Army shall have the right to conduct inspections and authorize and conduct searches and seizures on all areas leased and/or owned by the contractor on Fort Carson.

Id. para. 9.

105. *See supra* note 14 (based on research of military case law through October 2004).

106. *See* Search MFR, *supra* note 101, para. 2 (specifying "[t]o avoid any confusion concerning the issue . . . ."); *see also* note 104 and accompanying text (providing the text of the entire quote).

107. *See* Search MFR, *supra* note 101, para. 4, 8 (concluding that MRE 315(d) "creates a per se rule that anything on the installation is automatically within military control, and hence there is arguably no need to look further" and that privatized housing is under military control, and hence subject to military search authorizations).

Next, the DSJA proposes a solution to the potential problem through a contract modification.[108] Where the contract is silent on the issue,[109] as is the MHPI legislation,[110] legal scholars may take issue with a contract clause being the sole justification for a potential violation of a military member's Fourth Amendment right against an unreasonable search.[111] A contract clause directly addressing the issue puts all parties on notice, however there must be legislation supporting such a powerful clause. With legislation in place, as ultimately suggested by this article, a contract clause could cite to such legislative authority as the legal justification for the search. Finally, this article concurs with the Fort Carson Search MFR opinion that commanders should be able to authorize searches in privatized housing quarters,[112] albeit through a different solution to the issue presented as discussed in Section VII below.

IV. Federal Jurisdiction

A. The Law of the Land

"[T]he United States owns in fee some 662 million acres, or about 29% of all land in the country."[113] The United States Constitution has two primary provisions dealing literally with the law of federal land, the "Enclave Clause"[114] and the "Property Clause."[115]

The Enclave Clause's "reference to 'exclusive legislation' has always been interpreted as meaning 'exclusive jurisdiction.'"[116] About 6% of fed-

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108. *See supra* note 104 (providing the text of the DSJA's proposed contract modification).

109. *See supra* note 103 (highlighting that the contract was silent on the issue of search and seizure in the privatized housing).

110. *See supra* note 10 (listing the extensive military housing legislation).

111. *See supra* note 8 (providing the text of the Fourth Amendment).

112. *See supra* notes 101, 103, and 104 (discussing the DSJA's review, recommendations, and conclusions with the Fort Carson RCI contract and the issue of search and seizure in privatized housing).

113. GEORGE CAMERON COGGINS, CHARLES F. WILKINSON & JOHN D. LESHY, FEDERAL PUBLIC LAND AND RESOURCES LAW 1 (3d ed. 1993). While the Bureau of Land Management (BLM) controls nearly ten percent of the land in the United States, the other nineteen percent of federal land is owned by federal agencies for a variety of government activities, such as the military, reservoirs, national parks, wildlife refuges, post offices, office buildings, and atomic reactor sites. *See id.* "Public domain" has two meanings: (1) lands acquired by the United States from other sovereigns, including Indian tribes, that is still federally-owned, and (2) "acquired lands" that the United States acquired or "reacquired" from private or state owners by gift, purchase, exchange, or condemnation. *See id.* at 2.

eral land, including some, but not all military bases, is wholly or partially exclusive jurisdiction.[117] While there are numerous aspects of jurisdiction,[118] in this context, the focus is legislative jurisdiction which is a legislative body's[119] authority to enact laws and conduct all business associated with its law-making function.[120] The Enclave Clause gives Congress the power to acquire legislative jurisdiction from a state "by consensual acquisition of land, or by nonconsensual acquisition followed by the State's subsequent cession of legislative authority over the land."[121] The legislative jurisdiction acquired can range from exclusive, to concurrent, or partial.[122]

The power the "Property Clause" vests in the United States is different from the power derived from the "Enclave Clause."[123] The Supreme Court has held that under the "Property Clause," Congress' power over federal public land is without limitations,[124] including the power to regulate private land adjacent to federal land when the regulation is for the protection of federal property.[125]

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114. U.S. CONST. art. I, § 8, cl. 17 states:

> To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . .

115. *Id.* art. IV, § 3, cl. 2 states:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

116. COGGINS, WILKINSON & LESHY, *supra* note 113, at 173 (citing United States v. Bevans, 16 U.S. (3 Wheat.) 336, 387 (1818)).

117. *See id.* Of the 662 million acres of federal land, approximately six percent (39 million acres) is held under exclusive federal jurisdiction, approximately five point five percent (36.5 million acres) is held under concurrent or partial jurisdiction, and the remaining eighty-eight point five percent or close to 600 million acres is held under proprietorial jurisdiction. *See id.* at 180 (providing statistics as of 1970).

118. BLACK'S LAW DICTIONARY 855-57 (7th ed. 1999).

119. In the context of the MHPI, and this section of the article, the legislative body is Congress.

In 1911, the Supreme Court held that Congress, not the Executive Branch, makes legislation with regard to federal land.[126] The court noted however that Congress could delegate the power to regulate land to the Executive Branch.[127] In 1911, the Secretary of Agriculture regulated fed-

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120. *See id.* at 856. "Legislative jurisdiction" may be defined as:

> The term "legislative jurisdiction," when used in connection with a land area means the *authority* to legislate and to exercise executive and judicial powers within such area. When the Federal Government has legislative jurisdiction over a particular land area, it has the power and authority to enact, execute, and enforce general legislation within that area. This should be contrasted with other authority of the Federal Government, which is dependent, not upon area, but upon subject matter and purpose and which must be predicated upon some specific grant in the Constitution. Federal legislative jurisdiction is a sovereign power, whereas land ownership is in the nature of proprietorial action of the Government. The fact that the Federal Government has legislative jurisdiction over a particular land area does not establish that it has actually legislated with respect thereto. All that is meant is that the United States has the *authority* to do so.

U.S. DEP'T OF ARMY, REG. 405-20, FEDERAL LEGISLATIVE JURISDICTION 3a (1 Aug. 1973) [hereinafter AR 405-20].

121. Kleppe v. New Mexico, 426 U.S. 529, 542 (1976).

122. *See id.*; *see also infra* sec. IV.B. (providing a detailed description of the four sources of legislative jurisdiction).

123. *See Kleppe*, 426 U.S. at 542. "But while Congress can acquire exclusive or partial jurisdiction over lands within a State by the State's consent or cession, the presence or absence of such jurisdiction has nothing to do with Congress' powers under the Property Clause." *Id.* at 542-43.

124. *See* United States v. San Francisco, 310 U.S. 16, 29 (1940) ("The power over the public land thus entrusted to Congress is without limitations."); *see also Kleppe*, 426 U.S. at 536 ("[D]eterminations under the Property Clause are entrusted primarily to the judgment of Congress.").

125. *See* Camfield v. United States, 167 U.S. 518, 525-26 (1897). In future cases, the Supreme Court relied on *Camfield*:

> And *Camfield* holds that the Property Clause is broad enough to permit federal regulation of fences built on private land adjoining public land when the regulation is for the protection of the federal property. *Camfield* contains no suggestion of any limitation on Congress' power over conduct on its own property; its sole message is that the power granted by the Property Clause is broad enough to reach beyond territorial limits.

Kleppe, 426 U.S. at 538.

126. *See* United States v. Grimaud, 220 U.S. 506, 517-18 (1911).

127. *See id.*

eral forest land to preserve it from destruction, however it was pursuant to rules proscribed by Congress.[128] By analogy, Congress should proscribe the rules for search authorizations in privatized housing to be executed by DoD. Just as the Secretary of Agriculture was charged with preserving the forests, DoD is charged with preserving law and order on military installations. One aspect of the preservation of law and order on an installation includes a commander's search authority. As discussed in Section VII, a clear congressional mandate that places privatized housing under the installation commander's control will provide the commander with search authority.

B. The Four Types of Legislative Jurisdiction

Pursuant to the "Enclave Clause," Congress has the power to exercise legislative jurisdiction over federal property. The United States can acquire the right to exercise legislative jurisdiction in three ways: by purchase and consent, by cession, and by reservation.[129] Once the United States has acquired land, it can fall under one of four categories of legislative jurisdiction: exclusive,[130] concurrent,[131] partial,[132] and, proprietorial.[133]

Each of these four types of legislative jurisdiction has its own distinct characteristics. Under exclusive jurisdiction, only Congress can legislate and the federal government is responsible for law enforcement. The State cannot enforce its laws except to serve civil or criminal process.[134] Under concurrent jurisdiction, both State and Federal laws are applicable so both the State and Federal governments may prosecute offenders of crimes in these areas.[135] Under partial legislative jurisdiction, the State grants to the

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128. *Id.* at 522. The Court found:

> The Secretary of Agriculture could not make rules and regulations for any and every purpose. As to those here involved, they all relate to matters clearly indicated and authorized by Congress. The subjects as to which the Secretary can regulate are defined. The lands are set apart as a forest reserve. He is required to make provision to protect them from depredations and from harmful uses. He is authorized "to regulate the occupancy and use and to preserve the forests from destruction." A violation of reasonable rules regulating the use and occupancy of the property is made a crime, not by the Secretary, but by Congress. The statute, not the Secretary, fixes the penalty.

Id. (citation omitted).

Federal government, without reservation, the right for the Federal government to execute and enforce its laws as if the area were under exclusive federal jurisdiction.[136] "[T]he authority to legislate, execute and enforce municipal laws reserved by the State [is administered as if] the United States had no legislative jurisdiction whatever."[137] Finally, when the United States exercises a proprietorial interest only, then the "United States

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129. ADMINISTRATIVE & CIVIL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, 50TH GRADUATE COURSE FEDERAL AUTHORITY OVER LAND & FEDERAL-STATE RELATIONS ON AND OFF THE INSTALLATION OUTLINE 3 (2001-2002) [hereinafter FEDERAL AUTHORITY OVER LAND]; *see also* Installation Jurisdiction, Military Commander & the Law, Fall 1996, CPD/JA, Maxwell AFB AL, *available at* http://www.afcee.brooks.af.mil/dc/dcp/news/download/b-InstallationJuristiction.pdf [hereinafter Installation Jurisdiction] (last visited Nov. 10, 2004). Under the purchase and consent method, the government purchases the property and the state legislature consents to giving the federal government jurisdiction. *See id.* at 302. For cession, after the federal government acquires title to the property, the state may cede jurisdiction, in whole or in part, to the federal government. Prior to 1940, jurisdiction was ceded by the state at the time the government acquired title to the property. After 1940, the government must affirmatively accept jurisdiction for cessions of jurisdiction from the state. *See id.* at 302-03; *see also* 40 U.S.C. § 255 (2000); FEDERAL AUTHORITY OVER LAND, *supra*, at 4. Finally for reservation, which occurred mostly in the western United States, the government ceded property to establish a state, but reserved some land as federal property, thus retaining legislative jurisdiction over the land it reserved. *See* Installation Jurisdiction, *supra*, at 303.

130. *See* AR 405-20, *supra* note 120, para. 3b. Exclusive legislative jurisdiction is:

> . . . applied when the Federal Government possesses, by whatever method acquired, all of the authority of the State, and in which the State concerned has not reserved to itself the right to exercise any of the authority concurrently with the United States except the right to serve civil or criminal process in the area relative to activities which occurred outside the area. This term is applicable even though the State may exercise certain authority over the land pursuant to the authority granted by Congress in several Federal Statutes *permitting* the State to do so.

Id.

131. *See id.* para. 3c. Concurrent legislative jurisdiction is:

> . . . applied in those instances wherein, in granting to the United States authority which would otherwise amount to exclusive legislative jurisdiction over an area, the State concerned has reserved to itself the right to exercise, concurrently with the United States, all of the same authority.

Id.

exercises no legislative jurisdiction [and the] Federal Government has only the same rights in the land as does any other landowner."[138]

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132. *See id.* para. 3d. Partial legislative jurisdiction is:

> . . . applied in those instances where the Federal Government has been granted, for exercise by it over an area in a State, certain of the State's authority, but where the State concerned has reserved to itself the right to exercise, by itself or concurrently with the United States, other authority constituting more than merely the right to serve civil and criminal process in the area attributable to actions outside the area. For example, the United States is considered to have partial legislative jurisdiction where the State has reserved the additional right to tax private property.

Id.

133. *See id.* para. 3e. Proprietorial interest only jurisdiction is:

> . . . applied to those instances wherein the Federal Government has acquired some degree of right or title to an area in a State, but has not obtained any measure of the State's authority over the area. In applying this, recognition should be given to the fact that the United States, by virtue of its functions and authority under various provisions of the Constitution, has many powers and immunities not possessed by ordinary landowners with respect to areas in which it acquires an interest, and of the further fact that all its properties and functions are held or performed in a governmental capacity as distinguished from an action performed by a private owner or citizen.

Id.

134. *See id.* para. 4a. In exclusive federal jurisdiction areas, the State is not obligated to provide any governmental services such as sewage, trash removal, road maintenance, and fire protection. *See id.*

135. *See id.* para. 4b. The Double Jeopardy Clause of the United States Constitution, which prohibits "any person . . . , for the same offence, to be twice put in jeopardy of life or limb," does not apply because the State and Federal governments are two separate sovereigns. U.S. CONST. amend. V; *see also* MCM, *supra* note 3, R.C.M. 201(d) discussion ("Although it is constitutionally permissible to try a person by court-martial and by a State court for the same act, as a matter of policy, a person who is pending trial or has been tried by a State court should not ordinarily be tried by court-martial for the same act.").

136. *See* AR 405-20, *supra* note 120, para. 4c.

137. *Id.*

138. *Id.* para. 4d. In a proprietorial situation the federal government can perform all of its constitutional functions without interference from anyone, including the State. With that said, the State retains legislative jurisdiction over the area as if it were owned by a private landowner rather than the United States. *See id.* Finally, "the State may not impose its regulatory power directly upon the Federal Government nor may it tax the Federal land. It may tax a lessee's interest in the land." *Id.*

C. Impact on Privatized Housing Projects

When the United States is considering a privatized housing project, how much of a role is legislative jurisdiction in the decision-making process? Zero.[139] While the type of legislative jurisdiction that an installation has will not impact the decision to go forward with a project, it will impact several issues concerning the privatized housing land, such as contracts, claims, and taxes.[140]

For law enforcement issues within privatized housing communities, exclusive, concurrent, or partial legislative jurisdiction will allow the commander to maintain law and order in those areas.[141] Exclusive federal jurisdiction over privatized housing areas, along with other recommended changes,[142] would leave little doubt that the commander controls the area for law enforcement purposes.[143] If the land planned for privatization is not exclusive federal jurisdiction, such jurisdiction can and should be acquired.[144]

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139. The two main sources of privatization information are the ACQWeb site, maintained by the Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics (www.acq.osd.mil) and the Army's RCI Web site (www.rci.army.mil). The ACQWeb site lists five broad guidelines for new project proposals: (1) Proper housing for service members and their families; (2) leveraging of government funds with private sector funds; (3) involvement of local government; (4) integration with private sector housing; and (5) housing developments must be within reasonable commuting distances of the installations. ACQWeb Privatization, *supra* note 9, at 3-4. The Army's RCI Web site details the Army's plans to simply improve close to 80% of the Army's family housing inventory by leveraging scarce government funds with private sector capital to attract world class developers to build innovative and creative projects in reduced time at reduced costs. Information Paper, subject: Army's Residential Communities Initiative (RCI) Army Family Housing (AFH) Privatization Program and Processes (Jan. 2002), *at* http://www.rci.army.mil/programinfo/RCI_Program_Information_Paper_August_2004.pdf. Neither source mentions legislative jurisdiction as part of its planning process.

140. *See* RCI Lessons Learned, *supra* note 84, para. 5c (contract issues), 5r (claims issues), and 5y (tax issues).

141. *See supra* notes 130-36 and accompanying text (discussing the various types of legislative jurisdition).

142. *See infra* sec. VII.D (discussing a suggested legislative solution).

143. *See supra* note 130 (discussing exclusive legislative jurisdiction).

144. *See infra* sec. VII.D (recommending acquisition of exclusive federal jurisdiction). The Army sets forth its procedures for acquiring legislative jurisdiction in AR 405-20. *See* AR 405-20, *supra* note 120, paras. 7, 9 (regulating procedures for acquisition of legislative jurisdiction and "notice and information").

V. Law Enforcement On and Off the Installation

A. The Commander's Inherent Authority On the Installation

"There is nothing in the Constitution that disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on base under his commander."[145] The commander's inherent authority and responsibility to maintain law and good order and discipline on a military installation is recognized by all branches of government.[146] The Department of Defense and Service Secretaries further emphasize the commanders' authority by empowering them to maintain installation law and order by providing the necessary regulations and law enforcement assets to carry out the mission.[147]

The law enforcement mission not only includes authority over service members, but also civilians on the installation.[148] While the authority over service members on the installation, and worldwide for that matter, comes directly from the UCMJ,[149] the authority over civilians on the installation comes from the commander's inherent authority described above.

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145. Greer v. Spock, 424 U.S. 828, 840 (1976).

146. *See* Major Matthew J. Gilligan, *Opening the Gate?: An Analysis of Military Law Enforcement Authority Over Civilian Lawbreakers On and Off the Federal Installation*, 161 MIL. L. REV. 1, 16 (1999) (vesting ultimate responsibility to ensure good order and discipline in the military in the President as Commander-in-Chief); *see also* U.S. CONST. art. II, § 2 (designating the President as Commander in Chief). Congress has delegated power to the Executive Branch through the Property Clause to "make all needful Rules and Regulations respecting the territory or other property belonging to the United States." U.S. CONST. art. IV, § 3, cl. 2; *see also* Gilligan, *supra*, at 16; *supra* note 115 for full text of the Property Clause. Additionally, Congress requires the Service Secretaries, such as the Secretary of the Army, to "issue regulations for the government of his department . . . and the custody, use, and preservation of its property." 5 U.S.C. § 301 (2000). The Supreme Court's views on the subject are clear. *See supra* notes 121-128 and accompanying text; *see generally* Cafeteria Workers v. McElroy, 367 U.S. 886, 893-94 (1961) (recognizing the inherent authority of an installation commander to make decisions that affect the installation).

147. *See* U.S. DEP'T OF DEFENSE, DIR. 5200.8, SECURITY OF DOD INSTALLATIONS AND RESOURCES 2-9 (25 Apr. 1991) (recognizing the authority of a DoD installation commander to take reasonably necessary and lawful measures to maintain law and order and to protect installation personnel and property); *see also* U.S. Dep't of Army, Reg. 190-13, Army Physical Security Program para. 1-23 (30 Sept. 1993) (designating that installation commanders "will issue the necessary regulations to protect and secure personnel, places, and property under their command per the Internal Security Act of 1950"). For the Internal Security Act of 1950, *see* 50 U.S.C. § 797 (2000).

B. Is Privatized Housing "On the Installation" or "Off the Installation?"

When privatized housing is within the borders of the installation, it is "on the installation" regardless of whether or not the property is owned by private landowners. When a privatized housing community is outside the borders of the installation, it seems logical to classify it as "off the installation." Where the privatized housing community is located, on or off the installation, has no impact on military law enforcement officials over service members (assuming a valid apprehension or search authorization),[150] but it will impact how they treat civilians.

1. Authority over Civilian Lawbreakers

One of the threshold issues for military law enforcement officials[151] is defining their authority over civilians. After identification of a violation, and possibly pursuit, a critical stage in the exercise of police power is the decision to arrest.[152] Once it is determined that a legal basis exists[153] to make an arrest/apprehension,[154] the location of the civilian is a primary factor in the extent of the commander's/law enforcement official's authority which, by law, is very limited.[155]

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148. *See* 18 U.S.C. § 1382 (2000):

> "Entering military, naval, or Coast Guard property. Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, forte arsenal, yard, station, or installation for any purpose prohibited by law or lawful regulation; or [w]hoever reenters or is found within any such [installation], after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof – [s]hall be fined not more than $500 or imprisoned not more than six months, or both."

149. UCMJ art. 5 (2002) (stating the territorial applicability of the UCMJ applies in all places).

150. *See id.*

151. *See* MCM, *supra* note 3, R.C.M. 302(b)(1) (defining military law enforcement as "[s]ecurity police, military police, master at arms personnel, members of the shore patrol, and persons designated by proper authorities to perform military criminal investigative, guard or police duties, whether subject to the code or not, when in each of the foregoing instances, the official making the apprehension is in the execution of law enforcement duties"). Both military members and civilians working in the military law enforcement capacity are extensions of the commander's authority. *See* Gilligan, *supra* note 146, at 2 n.2.

The primary basis for military law enforcement authority over civilians is derived from the inherent power of the installation commander to maintain law and order on the installation.[156] The Military Purpose Doctrine,[157] through case law, further expands the commander's authority over

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152. *See* Gilligan, *supra* note 146, at 3. Major Gilligan suggests that the police power to arrest "is perhaps the most intrusive of all governmental powers." *Id.* He asserts that an illegal arrest could violate a person's Fourth Amendment rights to be free from an unreasonable seizure and possibly warrant a civil tort action in an egregious case. *See id.*; *see also* Saucier v. Katz, 533 U.S. 194 (2001). In *Saucier*, Katz, a protestor, was arrested by Saucier, a military police officer, during a speech by Vice President Gore on an Army base. *See Saucier*, 533 U.S. at 198. In a civil rights suit, Katz claimed Saucier used excessive force in violation of his Fourth Amendment rights under the concept of an unreasonable seizure based on Saucier's allegedly shoving Katz into a police van. *See id.* The federal district court and the Court of Appeals for the Ninth Circuit denied Saucier's motion for summary judgment and the government, representing Saucier's interests, appealed. *See id.* at 199. The Supreme Court reversed and held that Saucier was entitled to qualified immunity. *See id.* at 200. The Supreme Court relied on an earlier precedent holding that "[i]f the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." *Id.* at 202 (citing Malley v. Briggs, 475 U.S. 335, 34 (1986)).

153. *See* MCM, *supra* note 3, R.C.M. 302(a)(1) discussion (requiring probable cause to apprehend a person subject to the UCMJ). "Probable cause to apprehend exists when there are reasonable grounds to believe that an offense has been or is being committed and the person to be apprehended committed or is committing it." *Id.* R.C.M. 302(c). "'Reasonable grounds' means that there must be the kind of reliable information that a reasonable, prudent person would rely on which makes it more likely than not that something is true. A mere suspicion is not enough but proof that would support a conviction is not necessary. A person who determines probable cause may rely on the reports of others." *Id.* R.C.M. 302(c) discussion.

154. This section is assuming the situation calls for a warrantless arrest. *Id.* R.C.M. 302(d)(2). *See infra* sec. V.B.2 for a comparison of situations that require an authorization to apprehend.

155. *See* UCMJ, art. 7(b); MCM, *supra* note 3, R.C.M. 302(c) (limiting military law enforcement official's authority to apprehend over persons to those subject to the UCMJ); *see also* Gilligan, *supra* note 146, at 6-7. While it is the subject of Major Gilligan's thesis, in short, the commander's authority over civilian lawbreakers is derived from the commander's inherent authority and an exception to the Posse Comitatus Act – the Military Purpose Doctrine. For a detailed discussion of the Posse Comitatus Act (18 U.S.C. § 1385) and its relation to this specific topic, *see* Gilligan, *supra* note 146, at 8-12. While the "Posse Comitatus Act (PCA) is the primary restriction on the use of military personnel in civilian law enforcement activities," there are constitutional, statutory, and common law exceptions. *Id.* at 8; *see also id.* at 11-12 nn. 47-53 for a discussion of the exceptions to the PCA. The Military Purpose Doctrine, a common law exception to the PCA, is the principle exception granting the commander and his military law enforcement personnel authority over civilians. *See id.* at 12.

156. *See supra* notes 145-46 (discussing sources of a commander's inherent power to maintain law and order on an installation).

civilians, both on and off the installation, for law enforcement actions that are performed primarily for a military purpose.[158]

2. On the Installation

On the installation, based on power flowing from the commander, "military law enforcement officials have the power to arrest civilian lawbreakers for the military purpose of maintaining law and order on the installation."[159] In *United States v. Banks*,[160] a case directly on point, Air Force Security Police arrested a civilian in an Air Force barracks room for possession of drugs.[161] The defense argued the arrest was a violation of the PCA.[162] The Ninth Circuit rejected the defense's argument and essentially ratified the Military Purpose Doctrine by holding that the "power to maintain order, security, and discipline on a military reservation is necessary to military operations."[163]

3. Off the Installation

Off the installation, military law enforcement activities are much more limited by the Posse Comitatus Act (PCA).[164] The off-post criminal activity must have a military nexus (an adverse impact on maintenance of law and order *on* the installation) for the Military Purpose Doctrine to apply as exception to the PCA.[165] The best example of a military interest in civilian criminal activity is the introduction of illegal drugs onto a mili-

157. *See supra* note 155 (discussing the Military Purpose Doctrine as an exception to the Posse Comitatus Act); *see also* Gilligan, *supra* note 146, at 13, sec. III (providing a detailed discussion of the Military Purpose Doctrine).

158. *See* Gilligan, *supra* note 146, at 14 (discussing expansion of commander's authority if performed for a military purpose).

159. *Id.* at 17-18 (footnote omitted).

160. 539 F.2d 14 (9th Cir. 1976).

161. *See id.* at 15.

162. *See id.*

163. *Id.* at 16 (citing Cafeteria and Rest. Workers Union v. McElroy, 367 U.S. 886 (1961)). The *Banks* court also held that when their actions are based on probable cause, military law enforcement officials may arrest and detain civilians for on-base criminal violations. *See Banks*, 539 F.2d at 16. The court concluded that the Trespass Statute, which gives the commander the express power to expel and prohibit re-entry of civilians onto the installation also implied the power to arrest. *See id.*; *see also* Gilligan, *supra* note 146, at 20 n.86.

164. 18 U.S.C. § 1382 (2000).

tary installation, declared by DoD to be an "important military interest."[166] As long as the military law enforcement activities are "passive"[167] and do not "pervade"[168] the activities of civil officials, then off-post investigations are legally permissible.

4. Private Dwellings – Rule for Courts-Martial (RCM) 302(e)[169]

While RCM 302(e) addresses apprehensions, and not searches, the Rule describes in particular detail when apprehensions can occur in private dwellings and offers insight for the analysis on searches in privatized housing.[170] A private dwelling includes:

> . . . dwellings, *on or off* a military installation, such as single family houses, duplexes, and apartments. The quarters may be owned, leased, or *rented* by the residents, or assigned, and may be occupied on a temporary or permanent basis. "Private dwelling" does not include . . . military barracks, vessels, aircraft, tents, bunkers, field encampments, and similar places.[171]

The rules describe the parameters for entering a private dwelling for purposes of an apprehension. No person may enter a private dwelling unless there is consent[172] or exigent circumstances.[173] Of particular interest to the main issue of this article, RCM 302(e)(2)(C) discusses entry into a private dwelling that is military property or *under military control* and

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165. *See* Gilligan, *supra* note 146, at 21-22 (discussing military law enforcement's limited authority over civilians off-post and noting "Military law enforcement officials have investigative authority wherever a legitimate military interest exists.").

166. *See id.* at 22-23, n.99 (citing Policy Memorandum Number 5, Inspector General, Department of Defense, subject: Criminal Drug Investigative Activities (1 Oct. 1987)); *see also* U.S. DEP'T OF DEFENSE, DIR. 5525.5, DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS 5.1.3, E2.1.5 (20 Dec. 1989).

167. *See* Gilligan, *supra* note 146, at 26.

168. *Id.* at 24 (citing United States v. Bacon, 851 F.2d 1312 (11th Cir. 1988) and United States v. Hartley, 796 F.2d 112, 114 (5th Cir. 1986)) (holding that military involvement must be "pervasive" to violate the [Posse Comitatus] Act).

169. MCM, *supra* note 3, R.C.M. 302(e).

170. *See id.* R.C.M. 302(e)(1) (noting that "[a]n apprehension made be made at any-place" minus certain exceptions); *see infra* sec. IV.

171. *Id.* R.C.M. 302(e)(2) (emphasis added).

172. *See id.* R.C.M. 302(e)(2)(A); *see also id.* MIL. R. EVID. 314(e), MIL. R. EVID. 316(d)(2).

173. *See id.* R.C.M. 302(e)(2)(B); *see also id.* MIL. R. EVID.315(g), MIL. R. EVID. 316(d)(4)(B).

RCM 302(e)(2)(D) discusses entry into a private dwelling that is *not under military control*.[174]

For a dwelling under military control, a probable cause to apprehend determination must be made by a commander (or military judge or military magistrate).[175] If the person to be apprehended is a resident, there must be probable cause to believe the person is present in the dwelling.[176] If the person to be apprehended is not a resident, the entry into the dwelling must be authorized by the commander with the probable cause belief that the person will be present at the time of entry.[177]

For a dwelling not under military control,[178] and the person to be apprehended is a resident of the private dwelling, the arrest warrant must be issued by a competent civilian authority.[179] If the person is not a resident, then both the arrest warrant and the search warrant authorizing the entry into the private dwelling must be issued by a competent civilian authority.[180]

The main issue as to the proper authority to authorize the apprehension is military control. If the private dwelling is under military control, then a commander has the authority to apprehend. If the private dwelling is not under military control, only a civilian authority can authorize the entry and arrest. By analogy, it is logical to believe that if the privatized dwelling is under military control, then the commander can authorize the search, but if the privatized dwelling is not under military control, then the commander cannot.

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174. *See id.* R.C.M. 302(e)(2)(D) (the rule does not use the language "not under military control," but actually refers to the dwellings as "private dwellings not included in subsection (e)(2)(C) of this rule").

175. *See id.* R.C.M. 302(e)(2)(C)(i) refers to officials listed in MRE 315(d) which includes commanders (MRE 315(d)(1), military judges (MRE 315(d)(2), and military magistrates (MRE 315 (d) analysis: "MILITARY MAGISTRATES MAY ALSO BE EMPOWERED TO GRANT SEARCH AUTHORIZATIONS."). *Id.* MIL. R. EVID. 315(d)(2) analysis, app. 22, at A22-29 (original text in capital letters).

176. *See id.* R.C.M. 302(e)(2)(C)(i).

177. *See id.* R.C.M. 302(e)(2)(C)(ii).

178. *See supra* note 174 (discussing R.C.M. 302(e)(2)(D)).

179. *See* MCM, *supra* note 3, R.C.M. 302(e)(2)(D)(i).

180. *See id.* R.C.M. 302(e)(2)(D)(ii).

VI. The Commander's Authority to Authorize Searches

For purposes of the analysis and examination of cases in this section, there are some assumptions that must be made to narrow the focus of a commander's authority to authorize searches in privatized housing areas. Assume, as laid out in the hypothetical case in Section I above: (1) there is no consent,[181] (2) there are no exigent circumstances,[182] (3) the commander is neutral and detached,[183] (4) the commander has provided with the proper information to make a probable cause determination,[184] and (5) there is no way the search could be construed as an inspection.[185]

A. Probable Cause Searches – Military Rule of Evidence 315

The general rule is that "[e]vidence obtained from searches requiring probable cause conducted in accordance with this rule is admissible at trial when relevant and not otherwise inadmissible under these rules."[186]

1. "Authorization to Search" v. "Search Warrant"

An "authorization to search" comes from a competent military authority and a "search warrant" is issued by competent civilian authority.[187] The authorization to search can be oral or written,[188] but the better

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181. *See id.* MIL. R. EVID. 314(e). Consent searches do not require probable cause. A potential issue with consent searches could arise in the area of privatized housing with regard to the required element of voluntariness. *See id.* MIL. R. EVID. 314(e)(4); *see also infra* sec. VII.C. for a discussion of this issue.

182. *See* MCM, *supra* note 3, MIL. R. EVID. 314(i), 315(g). Emergency searches to save lives under MRE 314(i) do not require probable cause ("In emergency circumstances to save life or for a related purpose, a search may be conducted of persons or property in a good faith effort to render immediate medical aid, to obtain information that will assist in the rendering of such aid, or to prevent immediate or ongoing personal injury."). These differ from the exigent circumstances discussed in MRE 315(g) which would otherwise require a probable cause determination, to include insufficient time to prevent destruction of evidence (MRE 315(g)(1)), lack of communication due to military operational necessity (MRE 315(g)(2)), search of an operable vehicle (MRE 315(g)(3)), and searches not otherwise required by the Constitution (MRE 315(g)(4)).

183. *See id.* MIL. R. EVID. 315(d)(1) (granting an *impartial* individual the power to authorize a search pursuant to this rule).

184. *See id.* MIL. R. EVID. 315(f).

185. *See id.* MIL. R. EVID. 313.

186. *Id.* MIL. R. EVID. 315(a).

187. *See id.* MIL. R. EVID. 315(b)(1), (2).

practice is to obtain the authorization in writing.[189] Each, the authorization and the warrant, are express permission to search a specific person or area for specific property or evidence and to seize such person, evidence, or property.[190]

2. Scope of Authorization

The search authorization may be issued for: (1) persons subject to military law,[191] (2) military property,[192] (3) persons and property within military control,[193] and (4) nonmilitary property within a foreign country.[194] "Persons and property within military control" is defined as "*[p]ersons or property situated on or in a military installation*, encampment, vessel, aircraft, vehicle, *or any other location under military control, wherever located*."[195]

3. Power to Authorize

Commanders,[196] military judges, and military magistrates,[197] as long as impartial, can authorize searches. A commander must have "control

188. *See id.* MIL. R. EVID. 315(b)(1) (the authorization to search may contain an order to subordinates to search in a specified manner).

189. *See, e.g.*, U.S. Dep't of Army, DA Form 3745, Search and Seizure Authorization (Sept. 2002) (providing a simple one-page form to fill out and present to the appropriate authority for signature after providing the appropriate factual predicate); U.S. Dep't of Army, DA Form 3744, Affidavit Supporting Request for Authorization to Search and Seize or Apprehend (Sept. 2002).

190. *See* MCM, *supra* note 3, MIL. R. EVID. 315(b)(1) and (2).

191. *See id.* MIL. R. EVID. 315(c)(1) (including persons subject to the law of war).

192. *See id.* MIL. R. EVID. 315(c)(2) (military property includes "[m]ilitary property of the United States or of nonappropriated fund activities of an armed force of the United States wherever located").

193. *See id.* MIL. R. EVID. 315(c)(3).

194. *See id.* MIL. R. EVID. 315(c)(4).

195. *See id.* MIL. R. EVID. 315(c)(4) (emphasis added).

196. *See id.* MIL. R. EVID. 315(d)(1) (this section includes commanders and "other person[s] serving in a position designated by the Secretary concerned as either a position analogous to an officer in charge or a position of command"). The rule explicitly focuses on the function of the position of command, rather than rank, thus non-officers assuming command of a unit have the authority to grant authorizations. *See id.* MIL. R. EVID. 315(d)(1) analysis, at A22-29.

197. *See id.* MIL. R. EVID. 315(d)(2); *see also supra* note 175 (discussing the officials empowered to grant search authorizations).

over the place where the property or person to be searched is situated or found, or, if that place is not under military control, having control over the persons subject to military law or the law of war."[198] The latter clause raises an interesting issue. If the *place* is not under military control, but the *person* is, can the commander authorize a search of the *place*? So if privatized housing is not under military control, but its occupant, a service member, is, does the commander still have authority to search the place? Common sense says he does not. The commander could still authorize the search of the *person* even if the person was not in an area under military control (off-post), but certainly not of the *place* if the place is not under military control.

B. Some Cases

1. Reasonable Expectation of Privacy

One of the key elements courts analyze when searches are challenged is the person's reasonable expectation of privacy,[199] thought to be more limited in the military.[200] At two ends of the spectrum are barracks and private off-post dwellings. When a servicemember's reasonable expectation of privacy is low, such as in a barracks room, the commander's ability to intrude for an inspection or search is high. Conversely, when a servicemember's reasonable expectation of privacy is high, such as in an off-post dwelling, the commander's ability to intrude on that service member is severely limited. In the middle, there is government housing,[201] clearly distinguished by the rules from barracks.[202] Military courts have already recognized that residents of on-post government quarters do not have the same reasonable expectation of privacy as off post apartments.[203]

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198. MCM, *supra* note 3, MIL. R. EVID. 315(d)(1).

199. *See id.* MIL. R. EVID. 311(a), 311(a)(2)."Evidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity is inadmissible against the accused if . . . [t]he accused had a reasonable expectation of privacy in the person, place or property searched." *Id.* MIL. R. EVID. 311(a) and 311(a)(2).

200. United States v. Ayala, 22 M.J. 777, 783 (A.C.M.R. 1986) (recognizing that military members do not enjoy the same rights of privacy as civilians); *see also infra* note 203 (discussing the court's detailed rationale).

201. *See supra* note 170 (defining a private dwelling to include single family houses, duplexes, and apartments).

202. *See* MCM, *supra* note 3, R.C.M. 302(e)(2) ("Private" dwelling does not include . . . military barracks.).

There are no cases dealing with private quarters on post. The subsections below review the law for command authorized searches in government-owned quarters on post (for both military members and civilians), property leased on post by nonmilitary activities such as banks, government-leased and government-owned quarters off post, private property off post, and searches of government-leased property in foreign countries (for comparison purposes only).

2. *Government Quarters On Post*

"There has long existed in the services a rule to the effect that a military commanding officer has the power to search military property within his jurisdiction."[204] Since the UCMJ was enacted in 1950,[205] there have been numerous cases that have upheld this concept.[206] When service members have contested the commander's authority to authorize searches of their on post government quarters, civilian federal courts[207] have also upheld the concept. Under MRE 315, there is little doubt that commanders

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203. *See Ayala*, 22 M.J. at 783 ("We recognize that 'members of the armed forces cannot and do not enjoy the same rights of privacy as do the civilian elements of our society.'" (quoting United States v. Thomas, 21 M.J. 928, 932 (A.C.M.R. 1986))). The Army Court of Military Review went on to state: "[n]evertheless, within so-called 'family housing' quarters and other military facilities authorized for use as places of temporary residence for service member dependents or non-military guests, we believe that persons lawfully residing therein generally are vested with 'a reasonable expectation of privacy' within the meaning of MRE 311(a)(2)." *Id.* In an extensive footnote the court gave the following opinion of a commander's power over government family housing:

> Although "family housing" units are places in which individuals normally can enjoy a "reasonable expectation of privacy," their expectation is not of the same level of privacy that a civilian enjoys when residing in a rented apartment. An installation commander remains responsible for the proper and safe use of government quarters and government furnishings located on his installation. In this regard, he has certain powers in excess of those that most civilian landlords enjoy. Thus, for example, to preclude anti-deficiency act violations from occurring when utility funding is critical, an installation commander can direct that heating/air conditioning thermostat settings not exceed certain levels, and can authorize staff personnel to inspect for compliance. The level of privacy which reasonably can be expected in quarters in the process of being "cleared" obviously is even more diminished. We have no doubt that all military personnel who are assigned family housing are aware that administrative inspections are an inherent aspect of the quarters clearance process.

Id. at 784 n.14.

can authorize searches of on post government-owned quarters. This is true even if those quarters are occupied by civilians, either permanently assigned to the quarters, such as a dependent, or temporarily occupied by a guest.[208]

One additional issue regarding a commander's control over on post quarters is which commander on the installation controls the property.[209] For example, can the Commander, 3d Battalion order a search of on post quarters of a soldier in 2d Battalion. No, because he does not control that property. This issue is easily avoided by going to the Brigade commander, or better yet, the Garrison Commander, installation commander, or military magistrate.

3. Leased Property On Post

With no privatized housing cases reaching the courts (yet), one of the closest analogies is a commander authorized search of an on post credit union, which is a nonmilitary activity. In *United States v. Moreno*,[210] the Air Force court held that although the appellant's assignments of error on the search issue were without merit, they warranted discussion.[211] The installation commander authorized a search of the on base credit union's records.[212] The court dismissed the appellant's contention that the commander had no authority to authorize a search of credit union records under the Right to Financial Privacy Act[213] and focused on whether the com-

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204. United States v. Doyle, 4 C.M.R. 137, 139 (C.M.A. 1952). The Court of Military Appeals then described the basis for the rule and distinguished between a commander's power over military property and police power over a civilian's privacy:

> The basis for this rule of discretion lies in the reason that, since such an officer has been vested with unusual responsibilities in regard to personnel, property, and material, it is necessary that he be given commensurate power to fulfill that responsibility . . . . It is unnecessary, in this connection, to spell out the obvious policy considerations which require a differentiation between the power of a commanding officer over military property and the power of a police officer to invade a citizen's privacy. That there may be limitations upon the former's power, we do not doubt. Insofar as the power bears on criminal prosecutions, both trial courts and appellate forums are available to insure that the commanding officer does not abuse his discretion to the extent that rights of an individual are unduly impaired.

Id. at 140.

205. MANUAL FOR COURTS-MARTIAL, UNITED STATES app. II (UCMJ) (1951).

mander had control over the credit union.[214] The court held the search was

206. *See Doyle*, 4 C.M.R. at 139. Military courts further have found:

> The authority of a commanding officer to make or order an inspection or search of personnel and property under his control has long been recognized in military law . . . . "Authority to make, or order, [a] search of a member of the military establishment, or of a public building *in a place under military control*, even though occupied as . . . living quarters by a member of the military establishment, always has been regarded as indispensable to the maintenance of good order and discipline in any military command . . . such a search is not unreasonable and therefore not unlawful."

United States v. Florence, 5 C.M.R. 48, 50 (C.M.A. 1952) (citations omitted): *see also* United States v. Murray, 31 C.M.R. 20, 22-23 (C.M.A. 1961) (reviewing the validity of a commander's authority under assumption of command orders, the court upheld the principle that a commander has authority to authorize a search of on post quarters as an area under his control); United States v. Brown, 28 C.M.R. 48, 55-56 (C.M.A. 1959) (finding that the commander did not have reasonable suspicion to search the person of the accused, but the dissent, in exploring the commander's authority over persons and places under his control reviewed the history of the issue citing *Doyle*, *Florence* and *Rhodes*); United States v. Rhodes, 11 C.M.R. 73, 74 (C.M.A. 1953) (recognizing "the well-settled military rule that a commanding officer possesses authority to make or to order an inspection or search of personnel and property under his control").

207. "This rule and the reasons for it have been expressly recognized and approved by the Federal courts." *Brown*, 28 C.M.R. at 55 (Latimer, J., dissenting) (citing United v. Best, 76 F. Supp. 857 (D. Mass. 1948) and Richardson v. Zuppann, 81 F. Supp. 809 (Mid. D. Penn. 1949)). The two most commonly cited cases for military members having their cases heard in federal district courts challenging a commander's authority to search their on post quarters are *Richardson* and United States v. Grisby, 335 F.2d 652 (4th Cir. 1964). In *Richardson*, the defendant, an Army private, got to the federal district court through a habeas corpus petition while he was military prisoner in the United States Disciplinary Barracks after his conviction by a general court-martial. *See Richardson*, 81 F. Supp. at 810. The district court cited some old opinions validating the commander's authority to search on post quarters:

> As to the second contention that the search and seizure was unlawful, this search and seizure was made in the official office of petitioner as an Army officer on an Army reservation. The position of the Judge Advocate General in this matter is definite and unequivocal, as in CM 244713, Kemerer, 28 Board of Review 393, 403:
>
> "The immunity from searches and seizures guaranteed by the Fourth Amendment to the Constitution does not extend to premises on military reservations."
>
> Again in CM201878, Bashien: "The Judge Advocate General has held that the Commanding Officer of any person subject to military law, by virtue of the authority and control which he has as commanding

reasonable, because the "commander had law enforcement responsibilities over the on-base credit union."[215] The court also cited the terms of the credit union's lease which "authorized base law enforcement personnel to enter the credit union at any time for inspection and inventory and when necessary for the protection of the interests of the government."[216]

4. Government-Owned Property Off Post

The vast majority of government-owned or government-leased off post housing is overseas. This category of housing exists in the United

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207. (cont.)

> officer, may enter the quarters of an officer or soldier on a military reservation without permission of the accused and conduct a search therein, and that evidence so obtained is admissible." Citing CM 171626, Cutchin.
>
> Again, in JAG 250.413, Section 395 (27), Digest of Opinions of The Judge Advocate General, 1912-40, it was held: "Authority to make, or order, an inspection or search of a member of the military establishment, or of a public building in a place under military control, even though occupied as an office or as living quarters by a member of the military establishment, always has been regarded as indispensable to the maintenance of good order and discipline in any military command. * * * Such search is not unreasonable and therefore not unlawful."

Id. at 813.

In *Grisby*, the defendant, a marine corporal, went straight to federal court when the military let civilian authorities prosecute the accused's misconduct. *See Grigsby*, 335 F.2d at 654. Because his case was being held in district court vice a court-martial, the defendant challenged the validity of the search of his quarters authorized by the commander as opposed to a civilian magistrate. *See id.* at 655. The district court held:

> [T]here is no doubt about the validity of the search. [The 1951 MCM], promulgated by the President, with Congressional authorization, a search of property located within a military installation and occupied by persons subject to military law is valid when authorized by a commanding officer having jurisdiction over the place where the property is. The authorization of the Chief of Staff, acting for the commanding General, was in accordance with the Manual for Courts-Martial and validated, as a matter of military law, the search it approved.

Id. at 654.

States, but the majority of military court cases involving commander

208. *See* United States v. Brown, 784 F.2d 1033 (10th Cir. 1986) (discussing a dependent spouse of a military member living in government quarters); Saylor v. United States, 374 F.2d 894 (Ct. Cl.1967); United States v. Rogers, 388 F. Supp. 298 (E.D. Va. 1975) (discussing a government civilian contract employee living in government quarters). In *Brown*, the defendant was a civilian (the dependent husband of a military member) residing in government quarters at Kirtland AFB, New Mexico. The defendant challenged the search of the government quarters authorized by the commander pursuant to MRE 315. His main assertion was that military rules were inapplicable because all parties involved (the victim and suspects) were civilians and as such the Federal Rules of Criminal Procedure (Fed R. Crim. P. 41, the civilian counterpart to MRE 315) should have been followed. The 10th Circuit upheld the command authorized search finding the search followed the procedures set forth in MRE 315 and they did not violate the defendant's Fourth Amendment rights. *See Brown*, 784 F.2d at 1034, 1036-38.

In *Rogers*, the defendant was a civilian contract employee working and residing at the U.S. Naval Base at Guantanamo Bay, Cuba. The commanding officer authorized a search of Rogers' on base government quarters. The court reviewed two major issues, first whether the United States (Navy) can search the property of a civilian residing on base, and second whether the civilian is susceptible to the same search procedures as a military member or whether he gets full protections of the Fourth Amendment. The court held that based on the Navy's lease with Cuba, the United States retained complete control over all criminal matters occurring within the confines of the base and second, the civilian defendant was entitled to the full protections of the fourth amendment. After holding the commander controlled the area, the court held the search procedures followed by the military respected the rights guaranteed by the Fourth Amendment. *See Rogers*, 388 F. Supp. at 300-01.

Finally, in *Saylor*, the civilian defendant lived on a Navy base in Japan. The fact that this issue arose in a foreign country is not relevant in this portion of the analysis. The Court of Claims held that while the commander clearly controlled the area and could have lawfully authorized the search, the search authorization was so defective (lacking probable cause, specificity, etc.) it violated the defendant's Fourth Amendment rights and thus the search was held to be unlawful. *See Saylor*, 374 F.2d at 897-99.

209. *See* United States v. Mix, 35 M.J. 283 (C.M.A. 1992). Although the search in *Mix* dealt with the appellant's car, the issue was whether the commander controlled the area outside of a dining facility on post where the appellant's car was located. The appellant's battalion commander authorized a search of the car. Reviewing the issue, the Court of Military Appeals upheld the search under MRE 315(d)(1):

> Under the peculiar facts of this case all three battalion commanders as well as the brigade commander had control over the place where the automobile was located. This was a joint parking lot which surrounded the dining facility used by the three battalions.

Id. at 288.

210. 23 M.J. 622 (A.F.C.M.R. 1986).

211. *Id.* at 623.

212. *See id.*

213. The Right to Financial Privacy Act of 1978, 12 U.S.C. § 3406.

214. *See Moreno*, 23 M.J. at 624.

authorized searches of such off post housing originate overseas and those cases are discussed in Section VI.B.6. below. There are a couple of cases where the federal civilian courts have reviewed the commander's authority to authorize searches in off post government-owned or government-leased quarters in the United States.[217] In each case, the court scrutinized the lease to determine the issue of control and in each case, the court ultimately found the United States had control over the property, and thus upheld the searches.[218]

5. Private Property Off Post

As a universally accepted concept, commanders have no authority or control over private property off the installation. Thus, they cannot autho-

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215. *Id.* (citing Cafeteria and Rest. Workers Union v. McElroy, 367 U.S. 886 (1961) and United States v. Banks, 539 F.2d 14 (9th Cir. 1976)).

216. *Id.* at 624.

217. *See* United States v. Reppert, 76 F. Supp. 2d 185 (D. Conn. 1999); Donnelly v. United States, 525 F. Supp. 1230 (E.D. Va. 1981).

218. In *Reppert*, the defendant, a service member in the Navy, lived in an off base apartment leased by the Navy in Ledyard, Connecticut. Pursuant to MRE 315, the commander authorized a search of the apartment and the defendant argued "the search of his apartment was unlawful under [MRE] 315 since that rule does grant a commander the right to authorize a search of an off-base residence." *Reppert*, 76 F. Supp. at 187-88. The federal district court reviewed the terms of the rental contract which was entered by the United States for the benefit of U.S. Navy personnel and cited the following clause of the lease:

> In recognition of (1) the U.S. Navy's need to ensure security, military fitness, and good order and discipline and (2) the U.S. Navy's policy of conducting regularly scheduled periodic inspections, the Landlord agrees that while its facilities are occupied by ship's force, the U.S. Navy and not Tenant has control over the leased premises and shall have the right to conduct command inspections of those premises.

Id. at 188. The court held: "[b]ased on the lease, the defendant's apartment was "property under military control." Rule 315(c)(3). Therefore, the search was permissible under military law." *Id.* In *Donnelly*, the plaintiff was a Navy service member assigned to a nuclear submarine docked in Newport News, Virginia for extensive repairs for a period of eighteen months. The Navy furnished housing and negotiated several long-term leases in the civilian community. The court looked at the fact that the Navy was the lessor and the plaintiff did not have to sign a lease, nor did he have to pay any rent. Additionally, the Navy provided all furnishings and the government was liable for any damages to the apartment. Finally, the plaintiff was not required to live in the apartment furnished by the Navy, but made arrangements on his own. Based on these facts, the court found the Navy had complete control of the apartment and the commander had authority to authorize the search. *See Donnelly*, 525 F. Supp. at 1231-32.

rize searches there.[219] The rule, MRE 315 is clear on this point.[220] This is not to be confused with military law enforcement officials' authority, derived from the commander, to apprehend off post, both military members and civilians in limited circumstances.[221] Also, this is not to be confused with searches of military *members* off the installation.[222] Finally, there is a distinction for searches in foreign countries.[223]

6. Foreign Country

There are numerous cases addressing a commander's authority to authorize searches of military and nonmilitary property in a foreign country. There are various situations, all covered by MRE 315(c). First, there are searches of military property, such as government-owned quarters, wherever located (on or off the installation), governed by MRE 315(c)(2).[224] Next, there are searches of property within military control, such as government-leased quarters off the installation, governed by MRE 315(c)(3).[225] Finally, there are searches of nonmilitary property within a foreign country, such as privately-owned quarters off the installation, governed by MRE 315(c)(4).[226] There are other laws, such as Status of Forces Agreements (SOFA) and specific regulations governing such property,[227] but a line of cases is informative for comparison purposes to the privatized housing analysis.[228]

In perhaps the closest analogy to a search of privatized housing, in *United States v. Carter*,[229] the Court of Military Appeals held that a commander's authorization to search the private off post quarters of a service

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219. United States v. DeLeo, 5 C.M.R. 148, 157 (C.M.A. 1954) (holding "[i]nnumerable judicial decisions have announced that, in general, the search of a dwelling is illegal unless authorized by a warrant which meets the requirements of the Fourth Amendment. A military person's off-post dwelling -- located in the United States -- likewise may not lawfully be searched without a warrant.").

220. *See supra* notes 196-98 (discussing commander's power to authorize searches over locations they control); *see also* U.S. DEP'T OF ARMY, REG. 190-22, SEARCHES, SEIZURES, AND DISPOSITION OF PROPERTY para. 2-1(b) (1 Jan. 1983) [hereinafter AR 190-22] ("Searches conducted off military installations or in areas or buildings not under military control normally must be conducted by civilian authorities under the authority of a search warrant.").

221. *See supra* sec. V.B.3.

222. *See* MCM, *supra* note 3, MIL R. EVID. 315(c)(3).

223. *See id.* MIL. R. EVID. 315(c)(4).

224. *See id.* MIL. R. EVID. 315(c)(2).

225. *See id.* MIL. R. EVID. 315(c)(3).

226. *See id.* MIL. R. EVID. 315(c)(4).

member was lawful, because the service member controlled the property.[230] In France in the 1960s, the United States military had an arrangement very similar to privatized housing with a private French company for off post "rental guarantee housing" that provided for full occupancy by American military or civilian employees and their dependents.[231] Despite a SOFA provision and Army policy to the contrary,[232] the post commander ordered a search of a soldier's off post quarters.[233] The court noted the property was within France's jurisdiction and that the SOFA and Army policy required the installation commander to coordinate for French

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227. *See id.* MIL R. EVID. 315(c)(4)(B); *see also* AR 190-22, *supra* note 220, para. 2-1c.

> When the person or property to be searched is located in a foreign country, a search or seizure may be authorized according to this regulation. However, the authorization and actual conduct of the search or seizure is subject to international legal considerations. Thus, when the property is located outside of premises controlled by US forces, US military personnel will conduct searches only if such action has been consented to by host country authorities or if consistent with applicable international agreements or policy arrangements with host country authorities.

AR 190-22, *supra* note 220, para. 2-1c.

228. *See* United States v. Chapple, 36 M.J. 410, 411 (C.M.A. 1993) (discussing off post private quarters with a government-negotiated lease); United States v. Bunkley, 12 M.J. 240, 242 (C.M.A. 1982) (discussing off post private quarters held for the exclusive use of US military forces ; United States v. Mitchell, 45 C.M.R. 114, 116 (C.M.A. 1972) (discussing the impact of international agreements on searches); United States v. Carter, 36 C.M.R. 433, 437 (C.M.A. 1966) (discussing the extent of the military's control over the off post housing in the foreign country). In these cases, the various military courts considered the issue of whether a military commander could lawfully authorize an off post search of a private dwelling in a foreign country.

229. 36 C.M.R. 433 (C.M.A. 1966).

230. *See id.* at 437.

231. *Id.* at 435. Sergeant Carter's living arrangements were similar to the some provisions of the current MHPI:

> [The] accused resided off the military reservation in what is described as rental guarantee housing . . . [c]reated and owned by a private French corporation under guarantee arrangements for full occupancy by the United States Government with lodging assignments being held by American authorities. The corporation is obligated – so long as full occupancy is guaranteed – to rent only to the American military or civilian employees as well as their dependents.

Id. at 435; *see supra* notes 66, 68-69 and accompanying text (tenant guarantees and rental guarantees are two MHPI methods with High budget impact scores so that have not been utilized in any MHPI projects to date).

authorities to search off post quarters occupied by Americans.[234] Despite these facts, the court held the commander controlled the property and thus was authorized to order the search.[235]

In the foreign country cases following *Carter*, in the 1970s through 1990s, the courts have given more emphasis to the governing treaty provisions or regulations to determine what control, if any, the commander authorizing the search had over the off post quarters.[236] Ultimately however, if there is some element of control, combined with a reasonable search based on probable cause and meeting the fundamental concepts of the Fourth Amendment, the courts have upheld commander authorized searches of off post quarters.

VII. Privatized Housing – Time to Clear Up the Confusion on Who Has Control?

A. An Argument Against – The Commander Does Not and Should Not Have Control

Most challenges to a commander's authority to authorize searches off the installation have relied on the concept that the commander did not control the property.[237] The same argument cannot be made with respect to privatized housing, which is primarily within the borders of the installation.[238] The best argument for lack of control is the fact the government, through the MHPI, has sought to give up control of its military housing for the benefit of acquiring better military family housing at minimal cost to taxpayers.[239] If the government does not control the housing operation,

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232. *See Carter*, 36 C.M.R. at 436. In *Carter*, there was no dispute that the housing in question was under French jurisdiction. The NATO SOFA required American military officials to coordinate with and get French assistance for American military searches of such off post housing. *See id.* Under the U.S. Army Europe policy at the time, "installation commanders specifically had no authority to order searches of . . . living quarters outside the confines of the installation," commanders had to present the facts to the appropriate French authorities for action, and finally, if invited by the French, the Americans could accompany the French search party. *Id.* at 436 n.2.

233. *See id.* at 436. Despite the SOFA and policy, on this particular occasion, military law enforcement agents got authorization from the post commander to conduct a search of Carter's off post quarters. The agents informed the local French police, but both parties agreed that since only American military personnel were involved, the agents could conduct the search without assistance. *See id.*

234. *See supra* note 232.

then the commander cannot authorize searches on the privatized land pursuant to MRE 315(c)(3).[240]

The argument that commanders should not control privatized housing for law enforcement purposes must focus on the service member's reasonable expectation of privacy.[241] Privatized housing is designed to make old-style government housing look and feel like modern residential communi-

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235. *See Carter*, 36 C.M.R. at 440. The appellant argued that the SOFA controlled and the government violated its provision which required the American commander to go through the French authorities to search off post civilian-owned property occupied by Americans. The United States relied on the following provision from paragraph 152 of the *1951 Manual for Courts-Manual*:

> A search of property which is owned or controlled by the United States and is under the control of an armed force, or of property which is located within a military installation or in a foreign country or in occupied territory and is owned, used, or occupied by persons subject to military law or to the law of war, which search has been authorized by a commanding officer (including an officer in charge) having jurisdiction over the place where the property is situated or, if the property is in a foreign country or in occupied territory, over personnel subject to military law or to the law of war in the place where the property is situated.

Id. at 437 n.3 (quoting MANUAL FOR COURTS-MARTIAL, UNITED STATES para. 152 (1951)). The court found that the SOFA and the MCM were compatible and that the issue of control was really not an issue at all: "[i]t is with the Government's position that we must agree, for the Court is unanimous in its belief that the only pertinent question present, under the facts of this case, is whether or not the authority to search was granted upon probable cause." *Id.* at 437.

236. *See, e.g.*, United States v. Chapple, 36 M.J. 410, 411 (C.M.A. 1993), United States v. Bunkley, 12 M.J. 240, 242 (C.M.A. 1982), United States v. Mitchell, 45 C.M.R. 114, 116 (C.M.A. 1972). In *United States v. Mitchell*, the Court of Military Appeals stated: "[t]he question of whether and under what condition a military commander can lawfully authorize an off-post search of a private dwelling in a foreign country is dependent upon international agreement or arrangement between the involved countries, where such exists." 45 C.M.R. 114, 116 (1972). The court reviewed a commander's authorization to search a soldier's off post private residence in Okinawa, Japan. In *Carter*, the court described the United States' connection to the off post residences, but in *Mitchell* no such connection is described. With no military connection to the off post housing, the *Mitchell* court cited the then-existing 1960 version of *AR 190-22*, "[i]n the United States, its Territories, and possession searches off military installations in areas or buildings *not* under military control must be conducted by civil officials of the jurisdiction under the authority of a search warrant," making it clear that the military had no control over the off post housing. *Mitchell*, 45 C.M.R. at 116. Next, the court focused on the SOFA which gave the Okinawan Civil Administration or Magistrate Court exclusive jurisdiction to authorize search warrants off post. Consequently, the commander had no authority to authorize a search off post so the search was held to be unlawful. *See id.* at 117.

ties. Therefore, the occupant's expectation of privacy is equal to that of a service member living off post in a civilian community. For example, a

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236. (cont.)

In *United States v. Bunkley*, a "Deputy Subcommunity Commander" ordered a search of a soldier's off post quarters that was "documented for the exclusive use of the US Forces or otherwise occupied by the US Forces as a result of an agreement with the receiving state concerned" in the Federal Republic of Germany. 12 M.J. 240, 242 (C.M.A. 1982) (quoting U.S. ARMY EUROPE (USAREUR) SUPPLEMENT 1 to AR 190-22, para. 2-1c (Dec. 16, 1971) [hereinafter USAREUR SUPP. 1 to AR 190-22]). The court focused on the regulatory language "documented for" by comparing "search[es] of premises 'not documented for,' or occupied by, United States Forces." *Bunkley*, 12 M.J. at 242-43 (quoting USAREUR SUPP. 1 to AR 190-22, para. 2-1e). First, the court determined that a subcommunity commander was an authorized official for the area where the housing was located. *See id.* at 244. Next, citing *Mitchell*, the court followed its earlier holding that an American commander can authorize an off post search in a private dwelling in a foreign country when an international agreement or arrangement exists between the countries. *See id.* Finally, the court analyzed the United States - Germany SOFA, specifically finding that a provision in a supplemental agreement to the NATO SOFA authorized military law enforcement agents to enter civilian premises occupied by service members to conduct a search authorized by a competent military authority. *See id.* at 248 (citation omitted).

In *United States v. Chapple*, the appellant, a Navy seaman, lived off base in Italy in an apartment with his fiance who was also in the Navy. 36 M.J. 410, 411 (C.M.A. 1993). The appellant's fiancé leased the apartment from a private Italian landlord. *See id.* The lease was negotiated and prepared through the Navy's housing referral office operated by Naval Support Activity (NAVSUPPACT), Naples, Italy. *See id.* The commander of NAVSUPPACT ordered a search of the apartment for evidence of a crime against appellant. *See id.* Neither the appellant nor his fiancé who leased the apartment were in the NAVSUPPACT command. *See id.* at 411. The appellant argued that the commander who authorized the search did not have authority over the property, which was a privately-owned apartment leased and occupied by his fiance. *See id.* at 412. The court held that the commander's "authority to authorize the search of [the] apartment must be based on either his control over [the] apartment or his command relationship with [the lessor (the fiance)] or [the] appellant." *Id.* at 413. While the latter issue of no command relationship was obvious, the court's holding is interesting for the privatized housing analogy:

> We hold that [the commander] did not have "control" over [the] apartment, as that term is used in Mil.R.Evid. 315(d)(1). The sole authority relied upon by the Government . . . is [the commander's] responsibility [under Navy regulations] to operate a housing referral office. While that directive required [the commander] to provide assistance to military personnel in finding and contracting for housing, it does not confer any authority over the property leased through the housing referral office.

Id. In privatized housing arrangements, the command will still operate a housing referral office and work in conjunction with the private developers to ensure the privatized housing is occupied by service members. Similar to *Chapple*, the lease will be between the service member and the private landlord. *See generally infra* secs. III.D. and F.

commander cannot authorize a search of service member's private residence that is located just outside the gate of an installation. The central theme of this argument must focus on the word "control" rather than the theory that privatized housing looks and feels like private housing therefore the expectation of privacy is the same.

The increased expectation of privacy argument is a difficult one considering the fact that the installation commander is still responsible for maintenance of law and order on the installation as well as the protection to all persons and property within the installation borders.[242] Although the government may relinquish control of privatized housing land for housing purposes, the government has not relinquished control for law enforcement purposes.

Residents of a privatized housing area on an installation likely expect that privacy, protection, and safety that comes with living on a military installation. The commanders are charged with maintaining that safety and security through the law enforcement function. An argument that by giving up the housing function, the government has also given up the law enforcement function within that housing area is without merit as there is no legislation to support such a claim.

B. An Argument For – The Commander Does and Should Have Control

All three branches of government concur that a military commander has the inherent authority to maintain law and order on a military installation.[243] A congressional program designed to improve military family

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237. *See generally infra* sec. VI.B (discussing the reasonable expectation of privacy at various types of quarters).

238. There are no statistics for the actual number of privatized housing communities that will be located within the borders of the installation, but in general, the Army has the largest number of units to be privatized and the vast majority of the Army's units, if not all, will be located within the installation borders. *See supra* note 79; *see generally* U.S. DEP'T OF ARMY, ARMY FAMILY MASTER HOUSING PLAN 2001, ASSISTANT CHIEF OF STAFF FOR INSTALLATION MANAGEMENT (amended Oct. 2001), *at* http://www.armyhousing.net/documents/FHMP2001.pdf.

239. *See* ACQWeb Privatization, *supra* note 9, at 1-2. Of the five means for implemented privatized housing projects, conveyance of federal land and facilities by the government to private developers illustrate this point the best. *See supra* note 47.

240. *See* MCM, *supra* note 3, MIL. R. EVID. 315(c)(3).

241. *See supra* sec. VI.B.1.

242. *See supra* notes 155-56 and accompanying text.

housing, executed by DoD, has done nothing to impact that authority.[244] Privatized housing is within the installation borders. Any system requiring the commander, through military law enforcement officials, to coordinate with local civilian authorities anytime a law enforcement issue arises within the borders of the installation would seriously hinder all parties ability to maintain law and order.

Commanders must maintain good order and discipline on an installation. The authority to do so must include the right the search areas on the installation.[245] The UCMJ ensures that commanders respect soldier's rights, including the protections of the Fourth Amendment. With personal legal advisors, military justice training, and extensive regulations for law enforcement personnel within their command, commanders are well equipped to make informed decisions concerning search authorizations in privatized housing areas.

Since the September 11, 2001 terrorist attacks on the World Trade Center towers in New York and the Pentagon in Washington, D.C., installation commanders have taken steps to increase security on installations, such as placing gate guards on installations previously considered to be "open posts."[246] It would be illogical for privatized housing areas not to enjoy the same security protections as the rest of an installation.

While privatized housing developers include numerous amenities in their proposals, such as parks and restaurants, for the enjoyment of the res-

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243. *See id.*

244. *See supra* note 10.

245. *See* U.S. DEP'T OF ARMY, REG. 190-16, PHYSICAL SECURITY para. 2-2 (31 May 1991) ("Installation commanders will develop, set up, and maintain policies and procedures to control installation access. They will [p]rescribe and distribute procedures for the search of persons (and their possessions) on the installation. These procedures will cover searches conducted as persons enter the installation, while they are on the installation, and as they leave the installation.").

246. *See* Richard J. Newman, *It's Cool to Be a Soldier Again*, Mar. 11, 2002, at 1, *available at* LEXIS, News Library, U.S. News & World Report File (discussing the security cordon at the front gate of the U.S. Military Academy at West Point, New York); William Branigin, *Fairfax Pushes Army to Reopen Fort Belvoir Road*, Feb. 12, 2002, at 1, *available at* LEXIS, News Library, U.S. News & World Report File (discussing the closure of certain roads at Fort Belvoir, Virginia).

idents, law enforcement is not one of those amenities. Law enforcement is a governmental function and must remain under the commander's control.

Finally, if a commander does not have control over privatized housing for law enforcement purposes, any command-initiated search in such areas could result in a constitutional tort lawsuit for a violation of the Fourth Amendment.[247]

C. A Contract Solution – Will It Work?

In basic terms, privatized housing involves two separate and distinct contracts, one between the government and the private developer, and one (a lease) between the private developer (now private landlord) and the service member tenant.[248] The first contract between the government and the developer is not an issue here. The second contract, however, the lease between the private developer and the military occupant, could present some issues. Other than assisting in the housing referral process, these leases do not involve the government. It is not an agreement between the government and the service member like the one a service member would sign prior to occupying on post government housing.

What if a lease clause, "Consent to Searches by the Command," is put into the standard boilerplate of a lease that a military member must sign prior to occupying a privatized house? The lease is between the military member and the private landlord and it has nothing to do with the commander, yet the government drafts the lease and requires as part of its contract with the private landlord to be in every lease with the military tenants. Would this solution work?

If a "consent search" were executed pursuant to such a clause, there is a strong argument that such a search would be unlawful. Under the circumstances, signing a lease prior to occupancy with a boilerplate consent clause buried among numerous other complex legal language would likely

247. *See* Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971). Constitutional torts is a complex area, but one is essentially a civil rights lawsuit against a federal official for a violation of a citizen's constitutional rights. Through *Bivens* and its progeny, the Supreme Court set forth the cause of action for such lawsuits, known as "Bivens actions." *See generally* William P. Kratzke, Some Recommendations Concerning Tort Liability of Government and its Employees for Torts and Constitutional Torts, 9 ADMIN. L.J. AM. U. 1105 (1996).

248. *See* ACQWeb Second Year Report to Congress, *supra* note 22, at 2-3.

not be considered voluntary under MRE 314(e)(4).[249] Consent issues are heavily litigated based on the fact that "[v]oluntariness is a question to be determined from all the circumstances."[250] In other words, voluntariness will be determined based on the facts of a particular case.[251] In the scenario described above, a consent clause buried within other legal boilerplate within a lease, is not the best solution for a command-authorized search of privatized housing. If a tenant were to sign such a lease prior to occupancy, it is difficult to argue such consent was knowing and voluntary when a search pursuant to that consent might take place months, possibly years, after such consent was granted. Another problem with this method is the fact that the command is not a party to the lease.

A better method would be to include a contract clause in the lease putting the tenant on notice that the although the landlord controls the property for all housing related issues, the commander controls the property for law enforcement purposes, including the right to authorize searches and seizures under applicable laws. Now, the tenant has not consented to any future searches, but has been put on notice that the commander has such authority. If and when a search becomes an issue, then law enforcement officials can seek consent at that time or go through the process of obtaining a search authorization if consent is not granted.

D. A Legislative Solution

1. Acquiring Exclusive Jurisdiction

If the land for a privatized housing project is on the installation, its jurisdiction status will be either exclusive, concurrent, or partial federal jurisdiction.[252] If the status of the land is either concurrent or partial, the

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249. *See* MCM, *supra* note 3, MIL. R. EVID. 314(e)(4).

250. *Id.* MIL. R. EVID. 314(c)(4); *see also* United States v. Richter, 51 M.J. 213, 216 (1999) (discussing whether the appellant voluntarily consented to a search when he was told the agents conducting the search had or would get a warrant if he did not consent); United States v. Radvansky, 45 M.J. 226, 228 (1996) (discussing whether the appellant voluntarily consented to urinalysis when he was told he would be subject to a command-directed urinalysis if he did not consent).

251. *See Richter*, 51 M.J. at 221 (the court considered the totality of the circumstances); *Radvansky*, 45 M.J. at 229 (finding that voluntariness of consent is decided by the totality of the circumstances).

252. *See supra* notes 130-133.

project should include a plan to acquire exclusive federal jurisdiction over the property designated for privatized housing.[253]

The planning process for privatization projects is extremely complex[254] and the teams of people preparing such projects consider every aspect of the land. The additional step of converting the land to an exclusive federal jurisdiction status greatly enhances the commander's ability to maintain law enforcement over the housing area. With exclusive jurisdiction, there is no doubt that the federal government, and hence, the commander has the sole responsibility for law enforcement in the privatized housing area.[255]

2. Amending 10 U.S.C. § 2871

The United States Code chapter authorizing military housing includes a broad definition of a "military installation" as an activity under the jurisdiction of a Service Secretary, or in a foreign country, those activities under the operational control of a Service Secretary or the Secretary of Defense.[256] The code does not address a commander's control over such property for law enforcement purposes, and more specifically, the subsections authorizing privatized housing, the Military Housing Privatization Initiative, does not address which party, the private developer or the installation commander, controls the property for any purpose.

Adding a definition of "control" to the MHPI stating that all privatized housing areas will remain under the jurisdiction and control of the Service Secretaries, regardless of the disposition of the land in subsequent sections, for all law enforcement purposes will make the issue clear.[257] A definition of control in the MHPI, the primary legislation, will provide the general notice that commanders control the privatized housing land for law

253. AR 405-20, *supra* note 120, para. 7 (Procedure for Acquisition of Legislative Jurisdiction), para. 9 (Notice and Information); *see also supra* note 130 and accompanying text (discussing exclusive federal jurisdiction).

254. *See supra* note 139 and accompanying text (discussing the lack of consideration for legislative jurisdiction when selecting a privatized housing project).

255. *See supra* note 130 (discussing exclusive legislative jurisdiction).

256. *See* 10 U.S.C. § 2801 (2000). Section 2801 is the initial section in Chapter 169, Military Construction and Military Family Housing. *See supra* note 10. Section 2871, the initial section of the MHPI, also contains definitions, but no references to control over the property. *See supra* note 7 (discussing the statutory authority for the MHPI).

257. This definition should be added to 10 U.S.C. § 2871.

enforcement purposes. This concept can then be incorporated in the Military Rules of Evidence and service regulations, including supplements at the installation level, to provide more specific notice to all parties concerning the commander's authority over such land.

3. Amending MRE 315(c)

For military practitioners, an amendment to MRE 315(c)(3) would end any potential debate on the issue of whether a commander controls privatized housing land for purposes of authorizing searches in such areas. By an Executive Order, the President could amend the Manual for Courts-Martial by including language within the Military Rules of Evidence, complete with an analysis in Appendix 22, updating the law to include privatized housing.[258]

A specific cross reference in MRE 315(c) to the United States Code section on privatized housing leaves no doubt as to the specific type of housing regardless of what the service may call a particular project. For example, the Army references such privatized housing as the Residential Communities Initiatives (RCI).[259] Also, such cross referencing to the United States Code within the actual text of rules with the Manual for Courts-Martial is not unprecedented.[260]

The proposed amendment to MRE 315(c) provides commanders, law enforcement officials, and practitioners advising commanders with the necessary legal framework to ensure the rights of those living in privatized housing areas are protected. With clear language in the rule specifically placing privatized housing within military control for search authorization purposes, the issue of whether the commander controls such property is eliminated.

4. Updating Regulations

Service regulations governing topics such as command authority, installation security, and law enforcement activities generally define the

258. *See* app. B for a draft executive order and proposed amendment to RCM 315(c)(3).

259. *See supra* note 24 (discussing the Army's RCI program).

260. *See* MCM, *supra* note 3, R.C.M. 909.

commander's and law enforcement personnel's policies, procedures, and parameters on the installation.[261] Starting with the Department of Defense, and moving down to the services, directives and regulations must be updated to include references to privatized housing and the commander's control over such property.[262]

At the lowest level, installations with privatized housing projects, whether completed, underway, or planned, must update their local supplements to their respective service regulations to provide specific notice of the commander's control over the new project. For example, many Army installations have local supplements to AR 27-10, Military Justice.[263] A specific provision detailing the commander's law enforcement authority for that installation's housing area will again eliminate any issue on the topic.

Publicizing the fact that a commander controls privatized housing for law enforcement purposes at the lowest level will both enhance the commander's ability to maintain good order and discipline and protect and safeguard personnel and property on the military installation.

VIII. Conclusion

A commander has the inherent authority to maintain law and order on a military installation for the preservation of good order and discipline and the protection of the persons and property under his care. Part of the commander's authority includes the power to authorize searches in areas under his control.[264]

Privatized housing is a relatively new concept in military family housing. Since its inception in 1996, privatized housing has grown exponentially in the military, with close to 40% of all military family housing in some phase of the privatization process. The concept of the government

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261. *See supra* note 147 (discussing the Department of Defense Directive and Army Regulation mandating commanders to provide security and protection of their installations).

262. *See* U.S. DEP'T OF DEFENSE, DIR. 5200.8, SECURITY OF DOD INSTALLATIONS AND RESOURCES (25 Apr. 1991) (note the publication date well before the MHPI of 1996).

263. *See supra* note 5 (discussing the statutory and regulatory sources of a commander's authority).

264. *See supra* note 245 (discussing the regulatory requirement for commanders' programs to safeguard their installations).

turning over its housing operations to private developers is here to stay. Military servicemembers will benefit from modern housing with all of the amenities designed to make military family communities on post look and feel like off post civilian residential communities.

Legislation must be implemented to make it clear that despite the efforts to privatize military family housing, commanders have not given up control over the land for law enforcement purposes. The commander's search authorization authority within privatized housing areas is essential for maintenance of law and order and protection of persons and property on the installation.

The best solution is to amend MRE 315(c)(3), specifically the section within the rules that defines persons and property within military control, as outlined in Appendix B.

Appendix A

Table 1

The initial four privatization projects based on date of contract award:[265]

Facility		Units	Award Date
1.	Naval Air Station (NAS) Corpus Christi/ Kingsville I, Texas	404	July 1996
2.	Naval Station (NS) Everett I, Washington	185	March 1997
3.	Lackland Air Force Base (AFB), Texas	420	August 1998
4.	Fort Carson, Colorado (Army)	2663	September 1999

265. *See* ACQWeb October 2001 Project List, *supra* note 23, at 1. The Roman numeral "I" for the Kingsville and Everett projects indicate there are subsequent, yet separate projects at these locations. The NAS Kingsville II project for 150 units was awarded in November 2000 and the NS Everett II project for 288 units was awarded in December 2000. *See id.* Compare this to the project at Marine Corps Base (MCB) Camp Pendleton, California where one project is being awarded in phases: MCB Camp Pendleton (Phase 1) for 712 units was awarded in November 2000 and MCB Camp Pendleton (Phase 2) is currently in the planning phase for 3595 units. *See id.* at 1-2.

Table 2

Thirty-five projects were awarded from 2000 through November 2004:[266]

Facility		Units	Award Date
1.	Robins AFB, Georgia	670	September 2000
2.	Dyess AFB, TexasNaval Station (NS) Everett I, Washington	402	September 2000
3.	MCB Camp Pendleton I, California	712	November 2000
4.	NAS Kingsville II, Texas	2663	September 1999
5.	NS Everett II, Washington	288	December 2000
6.	Elmendorf AFB, Alaska	780	March 2001
7.	Naval Complex (NC) San Diego (Phase I), California	3248	August 2001
8.	NC New Orleans, Louisiana	935	October 2001
9.	Fort Hood, Texas (Army)	5912	November 2001
10.	Naval Complex South Texas, Texas	665	February 2002
11.	Fort Lewis, Washington (Army)	3982	April 2002
12.	Fort Meade, Maryland (Army)	3170	May 2002
13.	Wright-Patterson AFB, Ohio	1536	August 2002
14.	MCB Beaufort/MCB Parris Island, South Carolina	1718	March 2003
15.	Kirtland AFB, New Mexico	1073	April 2003
16.	NC San Diego (Phase 2), California	3217	May 2003
17.	Fort Bragg, North Carolina (Army)	5580	August 2003
18.	MCB Camp Pendleton/MCB Quantico, California	4534	September 2003
19.	Presidio of Monterey, California (Army)	2209	October 2003
20.	Patrick AFB, Florida	552	October 2003
21.	Fort Stewart, Georgia (Army)	3702	November 2003

22.	Fort Campbell, Kentucky (Army)	4255	December 2003
23.	Fort Belvoir, Virginia (Army)	2070	December 2003
24.	Moody AFB, Georgia	606	February 2004
25.	Fort Irwin/Moffett Field, California (Army)	2806	March 2004
26.	Hawaii Regional Navy (Phase I), Hawaii	1948	April 2004
27.	Fort Hamilton, New York (Army)	228	June 2004
28.	Walter Reed Army Medical Center, Washington, DC/Fort Detrick, Maryland (Army)	963	July 2004
29.	Little Rock AFB, Arkansas	1200	July 2004
30.	Buckley AFB, Colorado	351	August 2004
31.	Fort Polk, Louisiana (Army)	3821	September 2004
32.	Elmendorf AFB (Phase II), Alaska	1194	September 2004
33.	MCB Yuma/MCB Camp Pendleton, California	897	October 2004
34.	Hanscom AFB, Massachusetts	784	October 2004
35.	Northeast Region Navy (NY, NJ, CT, RI, & ME)	4264	November 2004

266. *See* CRS Report to Congress, *supra* note 18, at 16, tbl. 2 (Military Housing Privatization Initiative Project Status), July 2001; *see also* ACQWeb November 2004 MPH Lists, *supra* note 24, *at* http://www.acq.osd.mil/housing/projawarded.htm.

Table 3

As of November 2004, thirty-six projects were in the solicitation phase and pending award by Congress:[267]

Facility		Units	Projected Award
1.	Hickham AFB, HI	1356	August 2003
2.	Little Rock AFB, AR	1200	December 2003
3.	Buckley AFB, CO	351	January 2004
4.	Offutt AFB, NE	2255	March 2004
5.	Beale AFB, CA	1344	March 2004
6.	Shaw AFB, SC	1491	April 2004
7.	Fort Eustis/Story, VA	1193	May 2004
8.	Cannon AFB, NM	1246	May 2004
9.	Fort Shafter/Schofield Barracks, HI	7364	June 2004
10.	Hill AFB, UT	1018	July 2004
11.	Fort Leonard Wood, MO	2472	July 2004
12.	Wright-Patterson AFB (Phase 2), OH	496	July 2004
13.	Nellis AFB, NV	1178	August 2004
14.	Fort Drum, NY	2272	October 2004
15.	Navy Northwest Region I, WA	2705	October 2004
16.	Picatinny Arsenal, NJ	116	November 2004
17.	Dover AFB, NJ	980	November 2004
18.	Fort Sam Houston, TX	926	November 2004
19.	Carlisle Barracks, PA	316	November 2004
20.	Fort Monmouth, NJ	623	November 2004
21.	Fort Bliss, TX	2776	January 2005
22.	Altus AFB, OK	726	March 2005
23.	Langley AFB, VA	1480	March 2005

24.	Eglin/Hurlburt AFB, FL	2155	March 2005
25.	Tinker AFB, OK	858	April 2005
26.	Luke AFB, AZ	426	April 2005
27.	Sheppard AFB, TX	910	April 2005
28.	McGuire AFB, NJ	2592	May 2005
29.	Navy Mid-Atlantic Region (VA, MD, WV)	5930	July 2005
30.	Fort Benning, GA	4055	September 2005
31.	Fort Knox, KY	3380	December 2005
32.	Fort Rucker, AL	1516	December 2005
33.	Fort Leavenworth, KS	1580	February 2006
34.	Scott AFB, IL	1593	March 2006
35.	Fort Gordon, GA	872	April 2006
36.	Redstone Arsenal, AL	503	June 2006

267. ACQWeb November 2004 MPH Lists, *supra* note 24, *at* http://www.acq.osd.mil/housing/projplanned.htm.

Table 4

The Army's top fifteen projects (ranked by number of units to be privatized):[268]

	Installation	Units
1.	Fort Shafter/Schofield Barracks, HI	7364
2.	Fort Hood, TX	5912
3.	Fort Bragg, NC	5580
4.	Fort Campbell, KY	4255
5.	Fort Benning, GA	4055
6.	Fort Lewis, WA	3982
7.	Fort Polk, LA	3821
8.	Fort Stewart/Hunter Airfield, GA	3702
9.	Fort Knox, KY	3380
10.	Fort Meade, MD	3170
11.	Fort Bliss, TX	2776
12.	Fort Irwin/Moffett Airfield/Camp Parks, CA	2806
13.	Fort Carson, CO	2663
14.	Fort Leonard Wood, MO	2472
15.	Fort Drum, NY	2272

268. *Id.*

Table 5

The Air Force, Navy and Marine projects (ranked by number of units to privatized):[269]

	Air Force (# units)	Navy (# units)	Marines (# units)
1.	McGuire AFB, NJ (2592)[270]	NC San Diego, CA (9133)[271]	MCB Camp Pendleton, CA (10,644)[272]
2	Offutt AFB, NE (2255)	Southeast Region (6076)	MCB Camp Lejuene, SC (4534)
3.	Eglin/Hurlburt AFB, FL (2155)	Mid-Atlantic Region (5930)	MCAS Beaufort/MCD Parris Island, SC (1718)
4.	Wright-Patterson AFB, OH (2032)[273]	Northeast Region (4264)	MCB Twentynine Palms, CA (1382)
5.	Elmendorf AFB, AK (2022)[274]	Hawaii Region (2950)[275]	MC Hawaii (1377)
6.	Keesler AFB, MS (1682)	Northeast West Region (2823)	MC Kansas City (137)
7.	Scott AFB, IL (1593)	Northwest Region (2705)	
8.	Holloman AFB, NM (1506)	Southeast West Region (1763)	
9.	Shaw AFB, SC (1491)	NC New Orleans, LA (941)	
10.	Langley AFB, VA (1480)	NC South Texas, TX (665)	
11.	Hickam AFB, HI (1356)	NS Ebverett, WAS (473)[276]	
12.	Beale AFB, CA (1344)	NAS Corpus Christi/ NAS Kingsville, TX (554)[277]	
13.	Cannon AFB, NM (1246)		
14.	Little Rock AFB, AR (1200)		

15.	Travis AFB, CA (1179)		
16.	Nellis AFB, AZ (1178)		
17.	Barksdale, LA (1090)		
18.	Kirtland AFB, NM (1078)		
19.	Hill AFB, UT (1018)		

269. The chart represents all Air Force projects with over 1000 units, all existing Navy projects, and all existing Marine projects. *See id.*

270. This Air Force project is combined with Army property at Fort Dix, New Jersey. *See id.*

271. Combined Phase 1 (3248 units), Phase 2 (3217 units), and Phase 3 (2668 units). *See supra* note 75.

272. Combined Phase 1 (712 units), Phase 2 (4534 units), Phase 3 (897 units) and Phase 4 (4501 units). *See* ACQWeb November 2004 MPH Lists, *supra* note 24.

273. Combined Phase 1 (1536 units), Phase 2 (496 units). *See supra* app. A, tbl. 2, row 13 and tabl. 3, row 12..

274. Combined Elmendort I (292 units) and Elemndorf II (1194 units). *See supra* app. A, tbl, 2, rows 6 and 32.

275. Combined Hawaii I (1948 units) and Hawaii II (1002 units). *See* ACQWeb November 2004 MPH LIsts, *supra* note 24.

276. Combined NS Everett I (195 units) and NS Everett II (268 units). *See supra* app. A, tbl. 1, row 2 and tbl. 2, row 4.

277. Combined NAS Corpus Christi/Kingsville (404 units) and NAS Kingsville II (150 units). *See supra* app. A, tbl. 1, row 1 and tbl. 2, row 4.

Table 6

When the privatization projects get large, they are broken into separate phases over a number of years. The two largest projects, Camp Pendleton for the Marines and the Naval Complex in San Diego acocunt for 7% of the total 95 projects for all services and 19,777 units or 11% of the total 180,581 units.[278]

	MCB Camp Pendleton, California	NC San Diego, California
Phase 1.	712 units (Nov. 2000)	3248 units (Aug. 2001)
Phase 2.	4534 units (Sept. 2003) (includes Quantico, VA	3217 units (May 2003)
Phase 3.	897 units (Oct. 2004) (includes Yuma, AZ)	2668 units (May 2004)
Phase 4.	4501 units (July 2005)	
Total	10,644 units	9133 units

278. ACQWeb November 2004 MPH Lists, *supra* note 24.

Appendix B

EXECUTIVE ORDER XXXXX
AMENDMENTS TO THE MANUAL FOR
COURTS-MARTIAL, UNITED STATES

By the authority vested in me as President by the Constitution and the laws of the United States of America, including chapter 47 of title 10, United States Code (Uniform Code of Military Justice, 10 U.S.C. §§ 801-946), in order to prescribe amendments to the Manual for Courts-Martial, United States, prescribed by Executive Order No. 12,473, as amended by Executive Order No. 12,484, Executive Order No. 12,550, Executive Order No. 12,586, Executive Order No. 12,708, Executive Order No. 12,767, Executive Order 12,888; Executive Order 12,936; Executive Order 12,960; Executive Order 13,086; and Executive Order 13,140, it is hereby ordered as follows:

Section 1. Part III of the Manual for Courts-Martial, United States, is amended as follows:

a. MRE 315(c)(3) is amended as follows:

(3) *Persons and property within military control.* Persons or property situated on or in a military installation, encampment, vessel, aircraft, or any other location under military control wherever located; or military family housing or military unaccompanied housing, commonly referred to as "privatized housing," and as defined by section 2872 of Title 10, United States Code, whether such privatized housing is located on or near the military installation within the United States and its territories and possessions; or

A FOURTH AMENDMENT PRIVACY ANALYSIS OF THE DEPARTMENT OF DEFENSE'S DNA REPOSITORY FOR THE IDENTIFICATION OF HUMAN REMAINS: THE LAW OF FINGERPRINTS CAN SHOW US THE WAY

MAJOR STEVEN C. HENRICKS[1]

I. Introduction

The Department of Defense (DOD), through the Armed Forces Institute of Pathology (AFIP), collects deoxyribonucleic acid (DNA) via blood samples from all service members.[2] The DOD collects the DNA samples for the sole purpose of identifying remains should a service member die while serving his or her country.[3] The AFIP stores the collected samples at a single site in the Washington, D.C. area.[4] From time to time, state, federal, and military law enforcement will seek to match DNA found at a crime scene or taken from a victim with the DNA samples stored at the AFIP site. Historically, the AFIP and the DOD honor such requests only when the request meets certain conditions, including that a "proper judicial order" accompanies the request.[5] This article reviews whether the Fourth Amendment[6] and recently enacted federal law[7] require a warrant or search

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1. Judge Advocate, U.S. Army. Presently assigned as the Group Judge Advocate, Fifth Special Forces Group, Fort Campbell, Kentucky. LL.M., 2003, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia; J.D., 1991, University of Kansas; B.A., 1988, Bethany College, Lindsborg, Kansas. Previous assignments include: Fort Monmouth, New Jersey, 1993-1996 (Legal Assistance Attorney, Administrative Law Attorney, Special Assistant U.S. Attorney, Trial Counsel, and Chief, Legal Assistance and Claims), Fort Riley, Kansas, 1996-1999 (Defense Counsel and Senior Defense Counsel), and Fort Hood, Texas, 2000-2002 (Chief, Legal Assistance, III Corps and Chief of Military Justice, 1st Cavalry Division). Member of the Kansas and Missouri bars.

2. *See* U.S. DEP'T OF DEFENSE, DIR. 5154.24, ARMED FORCES INSTITUTE OF PATHOLOGY 4 (20 Oct. 1996) [hereinafter DOD DIR. 5154.24].

3. *See id.*

4. *See* Interview with Mr. David Boyer, Director of Operations, Armed Forces Repository of Specimen Samples for the Identification of Human Remains, in Gaithersburg, Md. (Nov. 8, 2002) [hereinafter Boyer Interview].

5. *See* DOD DIR. 5154.24, *supra* note 2, at 6.

6. U.S. CONST amend. IV.

7. 10 U.S.C.S. § 1565a (LEXIS 2004).

authorization[8] before the AFIP provides part of a service member's DNA sample to law enforcement.

A. Hypotheticals

To help understand the issues present in this topic, consider the following hypothetical scenarios.

1. Hypothetical 1

An unknown individual sneaks into barracks located on a large United States Army (Army) installation, home to over forty thousand troops. Once inside the barracks, the individual observes a female soldier enter her barracks room, notes the soldier does not have a roommate, and sees that she fails to lock her door. The individual checks that no one noticed him, dons a mask, and enters the female Soldier's barracks room. Once inside, the individual threatens the female with a knife, brutally rapes and sodomizes her, and then leaves the barracks unobserved.

Shortly thereafter, the female Soldier reports to military authorities that someone she could not identify raped her. Military health care officials immediately perform a rape kit analysis, which produces a semen sample from the unknown individual. When the military investigation does not immediately produce a suspect, the victim demands that the Army check its "DNA database" against DNA from the semen sample for a possible match. The Army responds that there is no way to know a Soldier committed this crime,[9] and assuming a Soldier did rape the victim, Soldiers have a reasonable expectation of privacy in their respective DNA samples kept by the AFIP to identify human remains. A warrant or search authorization must therefore support any search done of an AFIP blood sample for a law enforcement purpose.

The victim, satisfied with neither that response nor the military investigation's progress, contacts local state law enforcement authorities and

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8. A search authorization is the military equivalent of a warrant. A search authorization must be based on probable cause and can only be issued by a military judge, military magistrate, or a commander. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 315 (2002) [hereinafter MCM].

9. Assume the installation is an "open post," meaning that civilians can freely enter and leave the installation without any identification check.

inquires if they will investigate her rape. Local law enforcement decides to open an investigation into the rape after determining the crime occurred on concurrent federal and state jurisdiction.[10] A local detective then submits a request, signed by the state agency head of law enforcement, to the AFIP requesting that they attempt a blind match of the suspect's DNA sample with the DNA samples under the AFIP's control. The AFIP's position remains unchanged, and a few months later the person who committed the rape, in fact a Soldier, kills a local civilian. The investigation of the killing conclusively establishes the Soldier as the rapist and the killer.

2. Hypothetical 2

Same facts as *Hypothetical 1*, but now military and state investigators both reasonably believe that the suspect is an unknown male Soldier who lives in some nearby barracks. There are approximately three hundred male soldiers who live in that barracks. The AFIP refuses to do a blind search of the three hundred Soldiers' DNA samples, in part because of no individualized probable cause.

3. Hypothetical 3

Same facts as *Hypothetical 1*, but now military and state investigators reasonably believe that the rapist is one of ten Soldiers seen around the barracks at the time of the rape. The investigation is in its early stages, and there has not yet been time to eliminate any of the ten Soldiers from suspicion. The AFIP's response is the same as in *Hypothetical 2*.

B. Article Overview

This article analyzes whether the DOD correctly requires a warrant or search authorization before releasing part of a service member's DNA or blood sample to law enforcement. First, the article reviews the DNA molecule, the DNA molecule's relationship to the human genome, and forensic testing of the DNA molecule. Second, the article discusses the AFIP's

10. Either the state or federal government has jurisdiction to prosecute crimes occurring in this area. There are four types of jurisdiction on military posts: exclusive federal legislative jurisdiction, concurrent legislative jurisdiction, partial jurisdiction, and proprietary federal interest. *See* U.S. DEP'T OF ARMY, REG. 405-20, FEDERAL LEGISLATIVE JURISDICTION 1 (1 Aug. 1973).

DNA sample collection protocol and then compares that process with the Federal Combined DNA Index System (CODIS) and fingerprint databanks. Within this section, the article addresses specific rules adopted by the DOD applicable to the release of the AFIP DNA samples.

Third, the article reviews federal statutory schemes that generally address whether and how federal executive agencies release information contained in records they possess. Fourth, the article examines whether service members have a reasonable expectation of privacy under the Fourth Amendment in the DNA samples they must give to the AFIP. Fifth, the article reviews and critiques recently enacted federal legislation that addresses the release of DNA samples to law enforcement. Sixth, based on the preceding review and analysis, the article addresses whether the AFIP's position in each hypothetical is correct.

The article then concludes that DNA's unique nature creates a reasonable expectation of privacy held by the service member in his AFIP DNA sample, which in almost all cases may be overcome only with consent to search or a search warrant or authorization. Moreover, the DOD's self-imposed rules concerning how and why the DOD and the AFIP collect service members' DNA separately creates a reasonable expectation of privacy by service members in their AFIP DNA sample, which again may only be overcome with consent or a search warrant or authorization.

II. DNA and the Human Genome

Most are by now familiar with three general DNA concepts: DNA is the building block of life; the double helix staircase model used to represent a DNA molecule; and matching DNA samples provide almost irrefutable identification of an individual. Any privacy analysis of an individual's DNA, however, must go deeper than this cursory knowledge. To know what privacy interests are at stake, one must understand what DNA is, what DNA can tell us about an individual, and what DNA may, in the future, tell us about that same individual.

A. The DNA Molecule

Deoxyribonucleic acid is present in every human cell.[11] Within each cell, DNA is a molecule made up of two strands of nucleotide acid.[12] Nucleotide acid subparts, called nucleotides, form the strands of the double

helix.[13] Nucleotides, in turn, are made up of three components: a nitrogen base, a phosphate molecule, and a sugar molecule.[14] The nitrogen base is further broken down to one of four organic bases: adenine (A), guanine (G), thymine (T), or cytosine (C).[15] These nitrogen bases arrange themselves in two ways. First, on either strand of the double helix the nitrogen bases form linear, non-overlapping sequences known as the DNA sequence (for example, ATTCCGGA).[16] Second, the nitrogen bases form base pairs between the two strands on the double helix.[17] Adenine-thymine (AT) is one base pair, while GC (guanine-cytosine) forms the other base pair.[18] Chemical bonds between these base pairs cause the nucleotide acid strands to come together as the double helix.[19]

The DNA sequence provides the code to life. Scientists have determined that the four nitrogen bases described in the preceding paragraph form code words, usually in groups of three letters.[20] Similar to a telegraph, a code phrase or message will begin with a start word, followed by a substantive message, and then followed with a code word saying the message is over.[21] The substantive portion of the message instructs how to

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11. *See* David H. Kaye & George F. Sensabaugh, Jr., *Reference Guide on DNA Evidence*, *in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 485, 504 (Federal Judicial Center ed., 2d ed. 2000).

12. *See id.* at 560.

13. *See* Human Genome Project Information Web Site, *Dictionary of Genetic Terms*, *at* http://www.ornl.gov/hgmis/publicat/primer2001/glossary.html (last modified Mar. 12, 2004) [hereinafter *Dictionary of Genetic Terms*].

14. *See id.*

15. *See* David Berman, Online News Hour, *The Inside Is Out* (Feb. 12, 2001), *at* http://www.pbs.org/newshour/extra/features/jan-june00/genome.html (on file with author).

16. *See* JOHN BLAMIRE, *Genotype and Phenotype: The Genetic Code*, *in* SCIENCE AT A DISTANCE *at* http://www.brooklyn.cuny.edu/bc/ahp/BioInfo/GP/GeneticCode.html (last visited Nov. 16, 2004).

17. *See* Human Genome Project Information Website, *From the Genome to the Proteome*, *at* http://www.ornl.gov/hgmis/project/info.html (last modified Mar. 11, 2004) [hereinafter *From the Genome to the Proteome*].

18. *See Dictionary of Genetic Terms*, *supra* note 13.

19. *See id.*

20. *See* BLAMIRE, *supra* note 16. Sixty-four three-letter words are possible in a four-letter alphabet.

21. *See id.*

create a living organism and provides the organism with unique characteristics known as genetic traits.[22]

A cell's cytoplasm is where a cell acts on DNA instructions necessary to produce a trait.[23] The DNA sends out its message by copying it onto a ribonucleic acid (RNA) molecule.[24] The RNA molecule then travels to the cell's cytoplasm where the cell converts the DNA instructions into a linear sequence of amino acids.[25] There are up to twenty classes of amino acids arranged in this sequence, and in the cytoplasm the amino acid sequence becomes a protein.[26] Often the protein takes the form of an enzyme catalyst that will cause or enhance a chemical reaction in the cell that then produces a genetic trait.[27] Eye color, blood type, skin pigmentation, and curly hair are all genetic traits caused by this process.[28] Deoxyribonucleic acid is therefore the molecule in the human body where our genetic traits reside in a nitrogen-based code.

B. The Human Genome

Within a human cell, DNA molecules form the twenty-three pairs of chromosomes found in a cell's nuclei.[29] A genome is the DNA that makes up a complete set of chromosomes.[30] A single human chromosome on average is 100 million DNA base pairs long,[31] and ranges from 50 million to 250 million DNA base pairs.[32] A complete human genome contains approximately three billion DNA base pairs.[33] Chromosomes are made up

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22. *See* BLAMIRE, *supra* note 16, at http://www.Brooklyn.cuny.edu/bc/ahp/BioInfo/GP/FlowInfo.html.

23. *See id.*

24. *See id.* The DNA coded sequence is redundant, meaning many of the same messages are sent out over and over again. Interestingly, computer programmers also often make their computer codes redundant to help ensure the program's vitality. *See id.*

25. Scientists believe that the substantive message sent to amino acids with three letter code words varies from one to four words. *See id.* at http://www.Brooklyn.cuny.edu/bc/ahp/BioInfo/GP/GeneticCode.html (last visited Mar. 31, 2004).

26. *See From the Genome to the Proteome*, *supra* note 17.

27. *See* BLAMIRE, *supra* note 16, *at* http://www.Brooklyn.cuny.edu/bc/ahp/BioInfo/GP/GeneticTrait.html.

28. *See* Berman, *supra* note 15.

29. *See From the Genome to the Proteome*, *supra* note 17.

30. *See id.*

31. *See id.*

32. *See id.*

33. *See id.*

of many genes,[34] but genes are nothing more than the strands of DNA sequence described in the proceeding two paragraphs that provide traits (that is, coding DNA sequence).[35] Just as every human cell contains DNA, almost every human cell contains a complete genome.[36]

In the 1990s, scientists set out to map the human genome's entire DNA base pair sequence.[37] The task was daunting, but with continued advances in computer processing and other technology, scientists completed the mapping and now know the complete three billion DNA base pair sequence.[38] Knowing the entire human genetic sequence, however, is only a first step. Scientists must still "crack the code" of the DNA sequence.[39] That is, scientists do not yet know in every circumstance where substantive (*i.e.*, coding) DNA sequence ends and non-coding DNA sequence begins.[40] By understanding the human genome, scientists can better understand a cell's proteome: all proteins' structures and activities within a cell.[41] The combined further study of the human genome and proteome will provide a molecular basis to understand and manipulate health, disease, and therefore life.[42]

C. Forensic Testing of the DNA Molecule

The DNA sequence of base pairs is 99.9% the same in each human being.[43] That .1% difference, however, is what makes each of us individuals and not clones. Some of the unique aspects of an individual's DNA are non-coding DNA sequence, often referred to as "junk DNA."[44] Signif-

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34. *See id.*

35. *See id.*

36. *See id.* All human cells except mature red blood cells contain a complete genome. *See id.*

37. *See* Human Genome Project Information Website, *U.S. Human Genome Project 5-Year Research Goal 1998-2003*, *at* http://www.ornl.gov/TechResources/Human_Genome/hg5yp/ (last modified Dec. 9, 2003).

38. *See* Berman, *supra* note 15.

39. The complete human genome has between thirty and forty thousand genes. *See From the Genome to the Proteome*, *supra* note 17.

40. *See* Berman, *supra* note 15.

41. *See From the Genome to the Proteome*, *supra* note 17.

42. *See id.*

43. *See* Berman, *supra* note 15.

44. Coding DNA is that part of the DNA sequence that provides instructions for protein action within the cell. That is, coding DNA constitutes a gene, and is usually made up of 1,000 to 10,000 base pairs. Non-coding DNA does not provide any known protein instruction. *See From the Genome to the Proteome*, *supra* note 17.

icant parts of the non-coding DNA sequence vary considerably between individuals.[45] Forensic scientists have seized on this difference to identify or exclude DNA from a known individual or to match or exclude DNA with another unidentified DNA sample.[46]

Directly sequencing even a junk DNA sequence is time consuming and costly, and usually only research centers working on mapping the human genome have this capability.[47] Scientists, however, have developed techniques where they identify specific parts of a DNA sequence, called alleles, that vary between individuals.[48] Even these alleles are not directly sequenced to make a match or exclusion.[49] Instead, scientists identify the sequence of base pairs that makes the selected allele unique.[50] There are various methods to select the correct sequence[51] of base pairs for this process. The two most common are variable number of tandem repeats (VNTRs) and short tandem repeats (STRs).[52] The STRs are the shorter of the two, and average 50 to 350 base pairs long.[53]

The restricted fragment length polymorphism testing (RFLP) usually tests the VNTRs and the polymerase chain reaction (PCR) technique tests the STRs.[54] The RFLP was the most common test used in the 1990s, and requires a relatively substantial amount of DNA to test effectively.[55] The PCR is the most common test used today, and requires a smaller amount of DNA because it uses an enzyme that copies and reproduces the relevant allele.[56] Both tests are effective on nuclear DNA only, and produce a "DNA fingerprint" that scientists can compare to other DNA samples. [57]

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45. *See* Kaye & Sensabaugh, *supra* note 11, at 493.

46. *See id.* at 522. The only exception is identical twins. *See id.*

47. *See id.* at 493.

48. Alleles are nothing more than a selected part of a DNA sequence. Some alleles are individually unique and some are not. For genetic or forensic typing, unique alleles are obviously used. *See id.* at 565.

49. *See id.* at 493.

50. *See id.*

51. Just like fingerprints, a person's DNA sequence remains constant over time. *See id.*

52. *See id.* at 494.

53. *See id.*

54. *See id.* at 506.

55. *See id.*

56. *See id.* at 497.

Comparing DNA fingerprints to determine a match or exclusion usually involves statistics, probability, and population genetics.[58]

D. Junk DNA?

The preceding background on DNA, DNA sequencing, and DNA testing helps clarify what scientists examine when matching or excluding DNA samples. Today, scientists obtain DNA fingerprints using the RFLP or PCR techniques on a person's junk DNA. As explained previously, junk DNA today tells us nothing about an individual the way a code sequence of DNA (that is, a gene) does. Thus, some argue that a person does not have the same privacy interests in junk DNA as he does in the complete DNA molecule or human genome.[59] Such an argument attempts to split a hair that should not be split.[60]

Science cannot yet explain junk DNA's purpose. Sometime in the future, however, science will likely know the answer to this riddle. Two current theories are junk DNA shows the history of human and individual evolution (that is, some junk DNA sequences are "fossils" of extinct genes humans no longer need), and other junk DNA sequences affect in unknown ways our cellular protein synthesis.[61] The potential to discover an individual's complete evolutionary history and know and understand a synthesis that affects our body's genetic traits is just as compelling a privacy interest as that which we have in code producing DNA sequences (that is, our genes).

Many people do not want public access to their genetic tendencies to be overweight or to develop cancer (what our genes can today tell about a person's possible future). Likewise, people may not want public access to how an individual's junk DNA sequences may help develop good (or bad)

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57. *See id.* at 495. Nuclear DNA (nDNA) is DNA that originates from a cell's nucleus, and is the type of DNA discussed in this article. There is a different kind of DNA that comes from cell's mitochondria (mtDNA). nDNA and mtDNA have no relationship to each other. Comparing mtDNA samples for a match requires direct sequencing, and is done when nDNA is highly degraded. *See id.*

58. *See id.* at 488.

59. *See* David H. Kaye, *The Constitutionality of DNA Sampling on Arrest*, 10 CORNELL J.L. & PUB. POL'Y 455 (2001).

60. *See* discussion *infra* Part V.B.

61. *See* Bob Kuska, *Should Scientists Scrap the Notion of Junk DNA?*, 90 J. NAT'L CANCER INST. 1032 (1998).

proteins that help develop traits. Thus, the pejorative term junk DNA does not justify a lowered privacy interest in that part of a person's DNA sequence. Whatever privacy interest we have in our DNA, the continual advance of scientific inquiry to understand what we did not know yesterday justifies an across the board privacy interest in the entire DNA molecule, and indeed the entire human genome.[62]

III. DNA and Fingerprint Repositories

While this article's purpose is to explore the Fourth Amendment and its applications to the DOD DNA repository, to better understand that repository, it must be compared to other similar federal repositories. For example, legislation controls how other federal repositories may use their stored information, and other federal repositories have litigated Fourth Amendment issues concerning the personal information they possess. Thus, this part in turn reviews the DOD's DNA Repository, the Combined DNA Index Center, and the National Criminal Information Center.

A. The Armed Forces Repository of Specimen Samples for the Identification of Remains

The DOD DNA Repository developed because of tragedy. On 12 December 1985, 237 members of the 3d Battalion, 502d Infantry Regiment of the 101st Airborne Division (3/502d Infantry) died in a plane crash near Gander, Newfoundland.[63] These troops had just completed a United Nations peacekeeping mission in the Sinai Desert and were en route to Fort Campbell, Kentucky, for the holidays.[64] At the time, experts used dental panorama x-rays to identify human remains from severely traumatic events, like aviation disasters, when fingerprint identification was not possible.[65] The 3/502d Infantry carried their troops' only dental panorama x-

62. It would be the rare case where DNA and the complete human genome would not both be present in a blood, semen, saliva, or hair sample. Certainly both are present in the blood samples at issue in this article.

63. *See* David Hoffman, *President Honors Soldiers Killed in Canadian Crash*, WASH. POST, Dec. 17, 1985, at A1. Eleven other Soldiers died in the crash; ten from other Army Forces Command units, and one Army Criminal Investigative Division agent. 3/502d Infantry Regiment Homepage, *Tragedy at Gander*, *at* http://www.campbell.army.mil/3502/tragedy_at_gander.htm (last modified Oct. 15, 2002).

64. *See id.*

65. *See* Boyer Interview, *supra* note 4.

rays with them, and the crash destroyed the x-rays.[66] Neither the Army nor the DOD had copies of these x-rays, making identification of many remains from this tragedy problematic.[67]

Following the Gander disaster, the DOD began to centralize the collection and storage of dental panorama x-rays.[68] The need for centralized records to identify deceased soldiers coincided with the rise of DNA forensic testing for identification. In 1991, the DOD began routinely using DNA to help identify human remains, and following the Gulf War, the DOD directed all servicemembers, active and reserve, to provide a DNA sample for this purpose.[69] Specifically, on 16 December 1991, the Deputy Secretary of Defense directed the Assistant Secretary of Defense for Health Affairs to formally implement DNA testing to identify servicemembers' remains.[70] This, in turn, caused the formation of a DNA specimen repository named the Armed Forces Repository of Specimen Samples for the Identification of Remains (AFRSSIR).[71] The AFRSSIR was and is a part of the AFIP.[72] A separate part of the AFIP, the Armed Forces DNA Identification Laboratory (AFDIL) performs DNA testing to compare samples for identification.[73]

Today, the AFRSSIR has over four million DNA samples on file and is close to its goal of obtaining a DNA sample from every service member, active and reserve.[74] The collection procedure is simple and happens, among other times, on induction into the armed forces, reenlistment, and before a troop deployment.[75] A service member completes requested information on a bloodstain card, watches a technician stain the card with the service member's blood, [76] and then signs the card.[77] By signing the

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66. *See id.*

67. *See id.*

68. *See id.*

69. *See* Mayfield v. Dalton, 901 F. Supp. 300, 302 (D. Haw. 1995), *vacated*, 109 F.3d 1423 (9th Cir. 1997).

70. *See* Memorandum, The Deputy Secretary of Defense, to Secretaries of the Military Departments et al., subject: Establishment of a Repository of Specimen Samples to Aid in Remains Identification Using Genetic Deoxyribonucleic Acid (DNA) Analysis (16 Dec. 1991).

71. *See* Armed Forces Repository of Specimen Samples for the Identification of Remains Homepage, *Repository History*, *at* http://www.afip.org/Departments/oafme/dna/afrssir/index.html (last visited Nov. 16, 2004).

72. *See id.*

73. *See* Boyer Interview, *supra* note 4.

74. *See id.*

75. *See id.*

card, an individual acknowledges that the blood sample on the card came from him or her, and that the individual read the attached Privacy Act Statement.[78] The back of the card contains the following Privacy Act Statement:

> 1. Authority: 10 U.S.C. 131 (Secretary of Defense), 10 U.S.C. 3013 (Secretary of the Army) 10 U.S.C. 5013 (Secretary of the Navy), 10 U.S.C. 8013 (Secretary of the Air Force), and 5 U.S.C. 301 (Departmental Regulations). A response is mandatory for DOD personnel, and possible consequences for failing to respond include adverse administrative actions and punitive disciplinary actions under the Uniform Code of Military Justice. A response is voluntary for DOD civilian personnel selected for the program, but possible consequences for failing to respond include ineligibility for deployment with U.S. Armed Forces, which, if a condition of employment, may result in adverse administrative action up to and including separation from the federal service. A response is voluntary for non-DOD personnel selected for the program, but possible consequences for failing to respond include exclusion from areas under the control of U.S. Armed Forces and hindrance of remains identification efforts.
> 2. Principal Purpose: Information in this system of records will be used for the identification of human remains. The principal purpose of the information is to identify reference specimen samples that will routinely be stored and not analyzed until needed for remains identification program purposes.
> 3. Routine Uses: Routine uses include notification to federal, state, local, and foreign authorities of the identification of human remains. Blanket routine uses do not apply to this system.
> 4. Destruction Notice: Specimen samples not used for identification of remains will be maintained for 50 years, and then destroyed. Samples will be destroyed prior to the scheduled destruction date upon donor request submitted following the conclusion of the donor's complete military service obligation or

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76. In 1997, the DOD stopped also collecting oral swabs for a DNA sample. *See* Memorandum, Assistant Secretary of Defense Health Affairs, to DNA Collection Site Personnel, subject: Elimination of Oral Swab Reference Specimen (28 Aug. 1997).

77. *See* Armed Forces Repository of Specimen Samples for the Identification of Remains Homepage, *DNA Specimen Collection Instructions*, *at* http://www.afip.org/Departments/oafme/dna/afrssir/dnapolicies/coll_instr.pdf (last visited Nov. 16, 2004).

78. U.S. Dep't of Defense, Armed Forces Institute of Pathology, DNA Bloodstain Card (08120) (Jan. 1997).

> other applicable relationship to DOD. (Complete military service is not limited to active duty service; it includes all service as a member of the Selected Reserves, Individual Ready Reserves, Standby Reserves, or Retired Reserves.) Requests for early destruction may be sent to Repository Administer, Armed Forces Institute of Pathology, Armed Forces Repository of Specimen Samples for the Identification of Remains, 16050 Industrial Drive, Suite 100, Gaithersburg, MD 20877.[79]

Not surprisingly, the collection of service members' DNA samples has at times been controversial, mainly over a fear of a sample's misuse—notwithstanding that AFRSSIR merely stores the DNA samples and AFIP does not produce a DNA fingerprint until identification of remains becomes an issue. At least three service members, two marines and one airman, have been court-martialed because they each refused to provide a DNA sample.[80] Each was convicted at their court-martial for failing to obey a lawful order.[81] The two marines then challenged the DOD's collection of DNA samples in federal court.[82] To address the fear of misuse, the Department of Justice informed the court of the following (as recounted in the court's opinion):

> Except for a limited number of "quality assurance" tests in which the DNA is typed to ensure that the repository's storage and analytical mechanisms are working properly, DNA is not extracted from the samples unless and until there is a need for it to assist in the identification of human remains; and
> [A]ccess to the repository facility, computer system and the samples themselves is strictly limited. Specimens stored in the repository are not to be used for a purpose other than remains identification unless a request, routed through the civilian secretary of the appropriate military service, is approved by the assistant secretary of defense for health affairs. The government notes that no such request from this program has ever been approved, though it is unclear how many, if any, such requests have been made.[83]

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79. *Id.*

80. *See* Sarah Gill, *The Military's DNA Registry: An Analysis of Current Law and a Proposal for Safeguards*, 44 NAVAL L. REV. 175, 175 (1997).

81. *See id.*

82. *See* Mayfield v. Dalton, 901 F. Supp. 300 (D. Haw. 1995), *vacated*, 109 F.3d 1423 (9th Cir. 1997) (stating that both marines had been honorably discharged after their courts-martial, and after the district court entered its decision, mooting the case on appeal).

Department of Defense Directive 5154.24 implements, *inter alia*, the DOD's concern to protect an individual's privacy interest in his AFRSSIR DNA sample.[84] It mandates that the AFRSSIR will "[I]mplement special rules and procedures to assure the protection of privacy interests in the specimen samples and any DNA analysis of those samples in accordance with subsection 3.5."[85]

Paragraph 3.5.1, *DOD Dir. 5154.24* limits DNA sample uses to the following: identification of human remains, internal quality assurance tests, any use of which the donor (or surviving next of kin) consents, and a criminal investigation or prosecution in which all of the following conditions are present:

> 1. The responsible DOD official has received a proper judicial order or judicial authorization;
> 2. The specimen sample is needed for the investigation or persecution (sic) of a crime punishable by one year or more of confinement;
> 3. No reasonable alternative means for obtaining a specimen for DNA profile analysis is available; and
> 4. The use is approved by the Assistant Secretary of Defense for Human Affairs after consultation with the General Counsel of the Department of Defense.[86]

Thus, when a service member provides a mandatory DNA sample, he or she may, in part, determine their continuing privacy interest in that sample by: science's continual study and understanding of DNA, the human genome, and the human proteome; the executive branch's statements to a federal court concerning the AFRSSIR DNA samples; the Privacy Act statement on the back of a bloodstain card; and *DOD Dir. 5154.24*. In other words, based on these sources, do servicemembers continue to have a privacy interest in their AFRSSIR DNA samples, and if yes, what is the extent of that interest? To help answer those questions, this article compares the AFRSSIR identification databank with other identification databanks.

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83. *Id.* at 302.
84. *See* DOD DIR. 5154.24, *supra* note 2.
85. *Id.* at 4.
86. *Id.* at 6-7.

B. The Combined DNA Index System

Given the rise and reliability of DNA forensic testing, Congress directed the Federal Bureau of Investigation (FBI), via the DNA Identification Act of 1994 and the DNA Analysis Backlog Elimination Act of 2000, to create and implement a Combined DNA Index System (CODIS).[87] The CODIS's mandates are to gather DNA samples from certain persons, profile those samples using the techniques described in Part II.C, and then enter the resulting DNA fingerprint into a searchable computer databank.[88] Some of Congress's stated purposes in implementing this Act were to exonerate the wrongly accused and convicted, help identify suspects, and convict the rightly accused.[89]

Deoxyribonucleic acid samples for the CODIS databank come from the following sources: (a) convicted state,[90] federal,[91] and military[92] offenders of "qualifying offenses"[93] who are currently incarcerated or are on release, parole, or probation; (b) unidentified DNA samples discovered at crime scenes or on crime victims; (c) unidentified human remains; and (d) family members of missing persons who voluntarily donate a sample.[94] For those individuals who are currently incarcerated or on release, parole, or probation for a qualifying offense, providing a DNA sample is mandatory. Refusing to provide a mandatory sample or even failure to cooperate can result in forcible retraction of a sample, administrative sanctions, revo-

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87. 42 U.S.C. §§ 14131-14135e (2000).

88. *See id.* § 14135a.

89. *See id.* § 14134 (congressional findings).

90. States make up their own list of qualifying offenses. Thus, qualifying crimes are similar, but usually differ, between state jurisdictions. *See id.* § 14132.

91. *See id.* § 14135b (including the District of Columbia).

92. Each service secretary is responsible for collecting DNA samples from their service's qualifying offenders, and then forwarding those samples to the Secretary of Defense. The Secretary of Defense is then responsible for analyzing the DNA sample to produce a DNA fingerprint for inclusion in the CODIS databank. The author understands this process as the various military confinement centers take samples from qualifying offenders, and then send the samples to the AFIDIL for analysis. The AFIDIL then forwards the resulting DNA fingerprint to the FBI for inclusion in CODIS. 10 U.S.C.S. § 1565 (LEXIS 2003).

93. Qualifying offenses usually include all sexual offenses and most felony offenses. *See, e.g.*, 42 U.S.C § 14135a.

94. *See id.* § 14132.

cation of release, parole, or probation, a separate criminal charge, or some combination thereof.[95]

Congress placed statutory limits on the CODIS databank's use, the violation of which authorizes a criminal penalty.[96] Specifically, the results of CODIS DNA analysis may be disclosed to criminal justice agencies for law enforcement identification purposes, in judicial proceedings, and to assist criminal defendants.[97] Exceptions to these "privacy protection standards" (as the statute names them) are tests and results that assist in protocol development and quality control.[98] Another exception allows use of the CODIS DNA analysis for a population statistics database and for identification research.[99] Before any exception can apply, however, CODIS personnel must remove all personally identifiable information from the DNA analysis.[100] Neither the statute nor implementing regulations[101] define the term "personally identifiable information," but the term likely means that, for an exception to apply, there must be no way to link a DNA fingerprint stored in the CODIS databank with an individual's name.

The different purposes between the CODIS databank and the AFRSSIR databank result in a fundamental difference between the databanks. For CODIS to work, a technician must analyze and profile each DNA sample resulting in a DNA fingerprint that the technician can then place in a searchable computer database. The AFRSSIR, however, does not initially profile the DNA samples it receives. Instead, the AFRSSIR merely stores the blood samples for possible later use in identifying remains. Thus, consistent with CODIS's purpose to help solve crimes, CODIS can conduct a blind search of an unknown DNA sample taken from a crime scene for any matches in their computer database. The AFRSSIR does not profile its samples on receipt, and therefore cannot conduct a blind computer database search upon request.[102]

C. The National Crime Information Center

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95. *See id.* § 14135a.

96. The statute explicitly authorizes the imposition of a fine of not more than $100,000. *See id.* § 14135e.

97. *See id.* § 14132(a)(3).

98. *See id.* § 14133(b)(2).

99. *See id.*

100. *See id.*

101. *See* Collection and Use of DNA Information, 28 C.F.R. subpt. 812.4 (LEXIS 2004).

Federal law charges the FBI to manage the National Crime Information Center (NCIC).[103] The NCIC links, by computer and telecommunications, local, state, tribal, federal, foreign, and international criminal justice agencies.[104] The NCIC's purpose is to identify first time offenders of qualifying offenses (including arrests for those offenses and protection orders)[105] and to identify previously unknown or unidentified suspects via information already entered in the NCIC.[106]

The following systems make up the NCIC: the Fingerprint Identification Records System (FIRS); Interstate Identification Index System (III System); and criminal history record repositories of participating criminal justice agencies.[107] Fingerprint records submitted by participating criminal justice agencies, individuals' criminal histories (that is, rap sheets), and a list of all names included in the fingerprint and rap sheet records make up FIRS.[108] The III System also contains fingerprint data, but includes other identifying data like tattoos and social security numbers as well.[109]

The NCIC mostly consists of information submitted at the state level and below. A typical scenario follows: A local jurisdiction arrests a suspect. Within twenty-four hours, that local jurisdiction submits the individual's "name, date of birth, fingerprints, tattoos, aliases, sex and race" in the NCIC computer system using a NCIC control terminal agency.[110] The

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102. The AFRSSIR Internet home page does discuss a database search, but this is merely a database containing the names of individuals who have given a sample. This type of search is necessary so multiple DNA samples from the same individual do not clog the system. For those who have served in the military, it is easy to imagine that a first sergeant may not take a Private's word that the private previously gave a DNA sample. Thus, units can verify with the AFRSSIR which of their service members needs to donate a DNA sample. *See* Armed Forces Repository of Specimen Samples for the Identification of Remains Homepage, *Database Query*, *at* http://www.afip.org/Departments/oafme/dna/afrssir/database.html (last visited Nov. 16, 2004). Also note that the AFRSSIR system assumes that the military will have a good idea of the identity of human remains that require conclusive identification, thus eliminating the need for a blind computer database search. For example, flight manifests or troop rosters coupled with already identified remains will narrow the possibilities in most cases to just a few persons.

103. *See* 28 U.S.C. § 534 (2000). The Attorney General delegated this responsibility to the Federal Bureau of Investigation. *See* Criminal Justice Information Systems, 28 C.F.R. § 20.31(a).

104. *See* 28 C.F.R. § 20.3(n).

105. *See* 28 U.S.C. § 534(e).

106. *See* United States v. Walker, 92 F.3d 714, 716 (8th Cir. 1996).

107. *See* 28 C.F.R. subpt. 20.3.

108. *See id.* § 20.3(l).

109. *See id.* § 20.3(m).

NCIC enters that information into its databanks, then compares that information against its databanks to ensure both that the individual gave his or her correct identification and also that another jurisdiction does not have charges pending.[111] Should another jurisdiction want the individual, the FBI sends an immediate notice of the NCIC "hit" to both the retaining and seeking jurisdictions.[112] The local jurisdiction assumes responsibility for the correctness of its entries, and has a duty to update its entries as any particular case progresses through the criminal justice system.[113]

Both federal statute[114] and regulation[115] govern privacy concerns raised by the NCIC's databanks. Generally, these provisions make it unlawful to access or distribute the information contained in the NCIC's databanks if not done for an official purpose. Absent a state law limiting such a disclosure, however, federal law does not prohibit release of arrest or conviction data to the public.[116] Thus, under this scheme, the federal government protects from disclosure only something called "non-conviction data."[117]

IV. Statutory Schemes That Address When the Executive Branch Can Release Records

The Privacy Act of 1974[118] and the Freedom of Information Act (FOIA)[119] are two federal statutory schemes that address how the federal government releases information it possesses. The Privacy Act recognizes that the federal government acquires immense quantities of information about individuals.[120] Concern for the privacy of this information produced the Privacy Act and its general rule of not releasing personal information to third parties without a subject's consent.[121] There are, however, twelve

110. *Walker*, 92 F.3d at 716.

111. *See id.*

112. *See id.*

113. An acquittal or dismissal is not a reason to remove an existing record from the NCIC. *See* 28 C.F.R. § 20.37.

114. 5 U.S.C. § 534(b) (2000).

115. 28 C.F.R. § 20.21(b).

116. *See id.* pt. 20 app.

117. Non-conviction data is defined at *id.* § 20.3(q). The distinction between conviction and non-conviction data attempts to strike a balance between not allowing certain information to employers versus the constitutional right of the freedom of the press. *See id.*

118. 5 U.S.C. § 552a.

119. *Id.* § 552.

120. *See* Cardamone v. Cohen, 241 F.3d 520, 524 (6th Cir. 2001).

exceptions to the Privacy Act's general rule.[122] The FOIA's purpose, on the other hand, is to help ensure the public understands government operation.[123] The FOIA's general rule is federal agencies should provide information about how the agency works to the public, but there are also several exceptions and exemptions to the FOIA's general rule of disclosure.[124]

Oftentimes, requests to federal agencies for information will cite both the Privacy Act and the FOIA as independent justification for the release of the requested information. In such cases, the agency must analyze the request under both statutes to determine if information is releasable. Federal agencies in receipt of requests for information will often conduct this dual analysis even when the request does not cite both statutes.[125] Thus, to help answer the questions posed in this article's hypotheticals, this article will review both statutes as they apply to the AFRSSIR DNA samples.

A. The Privacy Act

To ensure citizens have some control over personal information collected by the federal government, the Privacy Act, *inter alia*, requires executive agencies to give public notice[126] of any "system of records," and limits disclosure of records based on who is requesting the records the subject or a third person.[127] A system of records is records under agency control about an individual and that can be retrieved by an individual's name or identifying particular.[128] The AFRSSIR DNA samples probably fall

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121. *See id.*

122. *See id.*

123. *See* Doe Agency v. Doe Corp., 493 U.S. 146, 152 (1989).

124. *See id.*

125. *But see* Bartel v. Fed. Aviation Admin., 725 F.2d 1403 (D.C. Cir. 1984).

126. The purpose of the public notice is to give the public an opportunity to comment on the use of a system of records before an agency implements such use. *See* 5 U.S.C. § 552a(e)(11).

127. *See id.* § 552a(b).

128. *See id.* § 552a(a)(4) & (5).

within the definition of a system of records,[129] and the DOD accordingly gave public notice in the *Federal Register*.[130]

The public notice requires inclusion of several topics of disclosure, including the routine uses of the records, the purpose of the users, and blanket routine uses. In pertinent part, the AFRSSIR's public notice states as follows:

> In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DOD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:
>
> . . . .
>
> To a proper authority, as compelled by other applicable law, in a case in which all of the following conditions are present:
> [same language as contained in paragraph 3.5.1 of DODD 5154.24, at Part III.A];
> The Army's Blanket Routine Uses do not apply to this system.[131]

Thus, the AFRSSIR publicly states its intent that a routine use of its blood samples is to assist law enforcement if, and only if, law enforcement has a judicial order.[132] That does not end the inquiry under the Privacy Act, however, for one must next consider if any statutory exception allows disclosure of the AFRSSIR DNA samples.

There are twelve exceptions to the Privacy Act's general rule that an agency cannot disclose a record to a third person without the subject's consent, three of which are relevant to our inquiry.[133] First, 5 U.S.C. §

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129. A system of records includes "any item, collection, or grouping of information about an individual that is maintained by an agency, including . . . other identifying particular assigned to the individual, such as a finger or voice print . . . ." *Id.* § 552a(a)(4). Arguably, the AFRSSIR blood samples are not records under this definition because the AFIP has not done a DNA fingerprint for each sample. Nevertheless, the DOD's public notice lists "specimen collections" as a category of records. *See* Notice to Amend System of Records, 63 Fed. Reg. 10,205 (Mar. 2, 1998).

130. 63 Fed. Reg. at 10,205.

131. *Id.* Federal agencies, including the DOD and the Army underneath it, can and do list blanket routine uses that all of their systems of records are subject to, unless a particular system opts out of these blanket uses. The Army's blanket use contains a law enforcement routine use, but the AFRSSIR opts out of that use for its samples. *See* Notice to Amend Preamble to System of Records Notice, 66 Fed. Reg. 7745 (Jan. 21, 2001), *available at* http://www.defenselink.mil/privacy/notices/army/army_preamble.html (last modified Oct. 9, 2002).

552a(b)(3) allows disclosure pursuant to a published routine use.[134] As just shown, the AFRSSIR's routine use incorporates *DOD Dir. 5154.24*'s restrictive language. Second, 5 U.S.C. § 552a(b)(2) requires disclosure when the FOIA requires release of the record.[135] The next subheading will discuss the FOIA and if that statute requires release of the AFRSSIR DNA samples. Third, 5 U.S.C. § 552a(b)(7) (Exception 7) provides, under certain conditions, for disclosure of records to law enforcement with no warrant requirement.[136] Given that DOD, by its own directive, requires a warrant before releasing an AFRSSIR DNA sample, does *DOD Dir. 5154.24*, and the principle behind it, trump Exception 7?

As a general rule, a federal statute trumps an executive agency's directive to the degree they conflict.[137] A inquiry, however, must go deeper than that. If a statute produces an unconstitutional result, courts will stop or reverse such effects. Thus, if service members maintain a reasonable expectation of privacy in their AFRSSIR blood samples, then providing those samples to law enforcement without a warrant presumptively

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132. Although *DOD Dir. 5154.24* requires, *inter alia*, a judicial order, this term should be interpreted to mean a warrant or search authorization and not a subpoena. Usually, any party to a civil or criminal trial may issue a subpoena, but a judge can quash subpoenas issued in violation of the law. *See* United States v. Scaduto, No. 94Cr.311(WK), 1995 U.S. Dist. LEXIS 3715 (S.D.N.Y. Mar. 24. 1995). Importantly, the Supreme Court held in *United States v. Miller*, 425 U.S. 435 (1976) that if an individual holds a reasonable expectation of privacy in a record held by a third-party, this requires a court, upon proper motion, to quash a subpoena duces tecum to the third-party holding that record.

133. 5 U.S.C. § 552a(b)(1)-(12) (2000).

134. *See id.* § 552a(b)(3).

135. *See id.* § 552a(b)(2).

136. Exception 7 provides that disclosure:

> [T]o another agency or instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought.

Id. § 552a(b)(7).

137. *See* Int'l Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm., 427 U.S. 132 (1976).

violates service members' Fourth Amendment protections.[138] The article addresses this issue in Part V.

B. The Freedom of Information Act

Unlike the Privacy Act, the FOIA's general rule is to disclose requested agency records unless one of three exceptions or nine exemptions applies.[139] Only one exemption is relevant to this article's inquiry, the FOIA's Exemption 6.[140] Exemption 6 permits an agency to withhold records that are "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[141] The Supreme Court has defined similar files as information of a personal nature.[142] Clearly, if service members maintain a reasonable expectation of privacy in their AFRSSIR DNA samples, then those samples contain information of a personal nature.[143]

Freedom of Information Act Exemption 6 also requires a balancing between the privacy interest at stake and the public's interest in disclosure. In *Department of Justice v. Reporters Committee for Freedom of the Press*, the Supreme Court held that the only public interest in this balancing test is FOIA's core purpose: will the requested information shed light on how an agency performs its duties?[144] If not, even a minimal privacy interest authorizes withholding the requested agency records.[145]

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138. *See* Kiraly v. FBI, 728 F.2d 273, 275 (6th Cir. 1984) (saying that an unwarranted invasion of privacy precludes disclosure under both the Privacy Act and the FOIA).

139. 5 U.S.C. § 552. Note that neither FOIA nor the Privacy Act requires an agency to create records. *See* Flight Safety Serv. Corp. v. Dep't of Labor, No. 3:00-CV-1285-P, 2002 US Dist. LEXIS 8811 (N.D. Tex. May 16, 2002). Because the AFRSSIR does not make or keep DNA fingerprints, the law may not require the AFRSSIR to make such records upon a request to do a blind search of their samples. *But see supra* note 130.

140. *See* 5 U.S.C. § 552(b)(6).

141. *Id.*

142. *See* Dep't of State v. Washington Post, 456 U.S. 595 (1986).

143. Outside a Fourth Amendment analysis, the legal community is beginning to consider whether DNA should fall under the penumbra of constitutional rights that, taken together, protect an individual's right to privacy. *See* Jeffrey S. Grand, Note, *The Blooding of America: Privacy and the DNA Dragnet*, 23 CARDOZO L. REV. 2277 (2002). Freedom of Information Act Exemption 6 does not set the bar so high, however, that a constitutional right must be at stake to justify withholding. *See infra* text accompanying notes 146-47.

144. 489 U.S. 749 (1989).

145. *See* Nat'l Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 879 (D.C. Cir. 1989).

V. The Fourth Amendment

The Fourth Amendment paradigm, developed by Supreme Court precedent, provides a framework to analyze search and seizure issues. Courts continue to resolve fact patterns within the framework, but individual cases sometimes do not fit neatly within the borders of existing precedent. Thus, a change in circumstances may call into question whether the rationale for a particular precedent applies to a new case. If those changed circumstances are compelling, the court may distinguish a case or set aside the precedent.

The rapid rise of DNA use and our collective knowledge of the human genome represent a vast escalation of what cells and molecules from our bodies can tell others about us. Prosecutors and defense counsel alike appreciate DNA and the underlying science because such samples often establish guilt or innocence. Yet, as discussed in Part II, the DNA molecule is much more than a fingerprint, because it can tell others about our genetic history and genetic future. Thus, this article next considers existing Fourth Amendment precedent and determines how DNA, and specifically the AFRSSIR DNA samples, best fit within the paradigm.

A. The Fourth Amendment Paradigm

Criminal lawyers know the Fourth Amendment mantra by heart. The Fourth Amendment protects against unreasonable government searches and seizures.[146] Courts presume a law enforcement search unreasonable when done without a warrant or search authorization based on probable cause unless certain court-created exceptions apply.[147] A warrantless government search, however, is reasonable when the person objecting to the search does not have a reasonable expectation of privacy in the thing

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146. The Fourth Amendment states in its entirety that

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend IV. The Fourteenth Amendment to the Constitution makes the Fourth Amendment applicable to the States. *See* Schmerber v. California, 384 U.S. 757, 766 (1966).

147. *See* Preston v. United States, 376 U.S. 364 (1964).

searched.[148] Courts consider both an objective and subjective prong to determine whether a person enjoys a reasonable expectation of privacy: does the person, based on her conduct, have a subjective expectation of privacy in the thing searched?; and is society willing to recognize a privacy interest in the thing searched?[149] A court must say yes to both prongs before the Fourth Amendment applies, presumptively requiring the government to obtain a search warrant or authorization to search.[150]

1. The Supreme Court Addresses Bodily Intrusions and Chemical Analysis

The Supreme Court considered *Schmerber v. California*,[151] a driving while intoxicated case, in 1966. In *Schmerber*, the defendant consumed alcohol at a bowling alley before he and a friend left in a vehicle driven by the defendant.[152] Shortly after leaving, the defendant's car skidded off the road and hit a tree.[153] While the defendant received medical treatment, the police ordered medical personnel to also withdraw a blood sample from the defendant to determine the defendant's blood-alcohol content.[154] The defendant objected at the time the sample was drawn and again at his trial when the prosecution offered into evidence his blood-alcohol content.[155]

First, the Court ruled that although the police obtained no warrant to extract the defendant's blood to test it for alcohol content, they clearly had probable cause to do so.[156] Second, the Court found that any intrusion of the body to withdraw blood squarely implicated Fourth Amendment concerns.[157] Indeed, the Court noted it was the first time they had considered bodily intrusions under the Fourth Amendment, that their prior precedents

148. *See* Katz v. United States, 389 U.S. 347 (1967).
149. *See* Smith v. Maryland, 442 U.S. 735, 740 (1979).
150. *See id.*
151. 384 U.S. 757 (1966).
152. *See id.* at 758.
153. *See id.*
154. *See id.*
155. *See id.* at 759.
156. Both at the scene of the accident and at the hospital, the defendant showed signs of drunkenness. *See id.* at 768.
157. *See id.* at 767.

concerning government searches of property were not helpful, and that they therefore were writing on a "clean slate."[158]

The Court went on to note the important policy of protecting "personal privacy and dignity" which the Fourth Amendment represents.[159] On these facts, however, the Court found the police acted reasonably without getting a search warrant because there was probable cause to believe the defendant had committed a crime, and it was reasonable for the police to believe exigent circumstances existed because of diminishing blood-alcohol content over time.[160] The Court therefore recognized a bodily intrusion exception to the Fourth Amendment's warrant requirement, provided trained medical personnel perform the extraction and exigent circumstances exist.[161] Before this emergency exception applies, however, law enforcement must have probable cause to believe that the body fluid sought will contain evidence of a crime.

The Supreme Court's next important case addressing the Fourth Amendment and bodily intrusions to test body fluids came in *Skinner v. Railway Labor Executives' Association*.[162] In *Skinner*, various groups representing railroad workers sought injunctive relief against compelled blood, urine, and breath tests performed by the railroads on their workers to detect and deter alcohol and drug use.[163] The workers sought injunctive relief based partly on the premise that the compelled tests violated their Fourth Amendment rights.[164] *Skinner* upheld the federal regulations authorizing the compelled tests, and in doing so provided a Fourth Amendment analysis applicable to issues presented in this article.

The Court explained that a governmental intrusion into a body to take blood usually invokes the Fourth Amendment at two levels: the detention of the person necessary to make the extraction, and the subsequent chemical analysis of the sample.[165] The Court also held that chemical analysis of a urine or breath sample similarly invokes Fourth Amendment privacy concerns.[166] Important for any subsequently considered DNA analysis, the Court said a chemical analysis of urine was a Fourth Amendment

158. *See id.* at 768.
159. *See id.* at 767.
160. *See id.* at 772.
161. *See id.*
162. 489 U.S. 602 (1989).
163. *See id.* at 612.
164. *See id.*
165. *See id.* at 616.

search because the analysis could "reveal a host of private medical facts about an employee, including whether he is epileptic, pregnant, or diabetic."[167]

The Court then stated that determining the Fourth Amendment applies (that is, that railroad workers have a reasonable expectation of privacy in their blood, urine, and breath when the government seeks to chemically analyze those samples) is only the beginning of the inquiry, for it must next determine if the government acted reasonably in doing the search (that is, chemical analysis) without a warrant.[168] To determine if the government acted reasonably, the Court announced it must weigh the privacy interests at stake against the legitimate governmental interest promoted by the search.[169] Within this balancing test, the Court also put forth a "special needs" test for the government: a special need beyond law enforcement that makes obtaining a warrant impracticable.[170]

The Court articulated the government's special need to adequately regulate the railroad industry as the need to prevent accidents, especially when studies showed that industry had a drug and alcohol problem.[171] Locomotives and railcars could become lethal when operated by those under the influence of drugs or alcohol.[172] The Court then balanced the government's public safety concern against the privacy interests at stake by focusing on the manner used to gain the blood, breath, or urine.[173] The Court held that the bodily intrusions to get a blood or breath sample were insignificant when weighed against the need for public safety.[174] The Court also upheld the search of the urine samples using the same rationale,

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166. *See id.* at 616-18. The Court stated that a chemical analysis by the government of blood, breath, or urine was a search under the Fourth Amendment. The Court also noted that obtaining blood and urine samples might also be a seizure under the Fourth Amendment, but that its analysis protected the privacy interest regardless whether the facts presented a search or seizure of bodily fluids. *See id.*

167. *Id.* at 617.

168. *See id.* at 619.

169. The Court restated that a search without a warrant presumptively violates the Fourth Amendment, but would consider a balancing test or special needs test to overcome the presumption. *See id.*

170. *See id.* at 619-20.

171. *See id.*

172. *See id.*

173. *See id.*

174. *See id.* at 625. The Railroad did not test its employees randomly, but tested entire crews after an accident. *See id.*

but hinted it may have reached a different conclusion if an observer directly watched an employee urinate.[175]

Finally, finding the public need for safety so great, the Court held that the government could obtain the samples to test for drug or alcohol use even when probable cause was not present.[176] Given the public safety need, the government still acted reasonably conducting a search of blood, breath, or urine samples even when there was no individualized suspicion of wrongdoing.[177] *Skinner*, however, does not overrule *Schmerber* and its holding that law enforcement must generally have probable cause to test for drug or alcohol use. In *Skinner*, the railroads did the search to protect public safety, and not for a law enforcement purpose. Given that *Schmerber* and *Skinner* are reconcilable, how have courts squared these holdings with challenges to the CODIS system? The Supreme Court has not yet addressed the issue, but several federal appellate courts have.

2. *Federal Courts and CODIS*

Recall that CODIS requires state or federal governments to extract a DNA sample from those convicted of certain crimes who are incarcerated or on release, parole, or probation.[178] No current probable cause supports this governmental extraction of DNA. Indeed, there is usually no known crime under investigation when the government obtains the sample. Every federal appellate court to date that has considered the issue, however, has held that CODIS does not violate the Fourth Amendment, using either a balancing test or a special needs test. Two recent Supreme Court decisions, however, call into question the continuing validity of these past precedents, as explained in a recent federal district court decision.

a. The Balancing Test

Most federal appellate courts that have considered the constitutionality of CODIS under the Fourth Amendment rely on a balancing test between an individual's privacy interests and the governmental interest at stake.[179] For example, in *Jones v. Murray*, a Fourth Circuit case reviewing

175. *See id.* at 626.
176. *See id.* at 629.
177. *See id.*
178. *See supra* text accompanying note 88.

Virginia's version of CODIS,[180] the court found governmental interests in CODIS included obtaining an accurate way to identify felons (because felons possess a motive to change or alter their identities), helping solve past and future crimes, and acting as a deterrent to recidivism.[181] These interests outweighed the minimal intrusion of drawing blood by medical personnel.[182]

Jones recognized that the CODIS required no probable cause or suspicion to conduct a search, but, in a clever juxtaposition, piggybacked on the probable cause that brings a convict into the criminal justice system.[183] The court said:

> We have not been made aware of any case, however, establishing a per se Fourth Amendment requirement of probable cause, or even a lesser degree of individualized suspicion, when government officials conduct a limited search for the purpose of ascertaining and recording the identity of a person who is lawfully confined to prison. This is not surprising when we consider that probable cause had already supplied the basis for bringing the person within the criminal justice system. With the person's loss of liberty upon arrest comes the loss of at least some, if not all, rights to personal privacy otherwise protected by the Fourth Amendment.[184]

Partially relying on *Jones*, the Ninth Circuit in *Rise v. Oregon*[185] also upheld Oregon's version of CODIS.[186] *Rise* found that the minimal intrusion to draw blood did not outweigh the significant public interest in accu-

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179. *See, e.g.*, Shaffer v. Saffle, 148 F.3d 1180, 1181 (10th Cir.), *cert. denied*, 525 U.S. 1005 (1998); Boling v. Romer, 101 F.3d 1336, 1340 (10th Cir. 1996); Rise v. Oregon, 59 F.3d 1556 (9th Cir. 1995), *cert. denied*, 517 U.S. 1160 (1996); Jones v. Murray, 962 F.2d 302, 306 (4th Cir.), *cert. denied*, 506 U.S. 977 (1992). None of these cases considers the constitutionality of CODIS, but rather the constitutionality of state DNA databanks similar to CODIS.

180. 962 F.2d 302, 304 (4th Cir.), *cert denied*, 506 U.S. 977 (1992). Virginia's version of CODIS required anyone convicted of a felony after a certain date to provide a DNA sample. *See id.*

181. *See id.* at 307.

182. *See id.*

183. *See id.* at 306.

184. *Id.*

185. 59 F.3d 1556 (9th Cir. 1995), *cert. denied*, 517 U.S. 1160 (1996).

186. *See id.* at 1558. Oregon's version of CODIS required only sexual offenders and those convicted of certain violent crimes to provide DNA samples. *See id.*

rately identifying certain felons.[187] Unlike *Jones,* however, *Rise* coupled the drawing of blood with a convicted felon's diminished privacy interest in his or her identification: holding a convicted felon does not have a reasonable expectation of privacy in his identification, including DNA identification from a drawn blood sample.[188] While the court went on to perform a Fourth Amendment balancing test, under the court's logic, the weighing of state and individual interests was not relevant. A balancing test is only necessary if the Fourth Amendment applies, and if there is no expectation of privacy, then the Fourth Amendment does not apply.[189]

b. The Special Needs Test

The Second Circuit, in *Roe v. Marcotte*,[190] also upheld the constitutionally of Connecticut's version of CODIS,[191] but went to lengths to distinguish their reasoning from other federal circuits that used a Fourth Amendment balancing test.[192] In *Marcotte*, convicted sexual offenders sought an injunction prohibiting the state's attorney general from forcibly obtaining a DNA sample.[193] The Court made quick work of the plaintiffs' Fourth Amendment arguments, acknowledging that the analysis of blood constituted a search, but that the government's special needs allowed the government to proceed without a search warrant.[194]

Marcotte articulated the government's special needs as follows:

> [D]efendants cite studies indicating a high rate of recidivism among sexual offenders. Moreover, DNA evidence is particularly useful in investigating sexual offenses and identifying the perpetrators because of the nature of the evidence left at the scenes of these crimes and the demonstrated reliability of DNA testing. Defendants argue that the existence of state and national DNA data banks will serve an important governmental interest

187. *See id.* at 1562.

188. *See id.* at 1560.

189. *See* Skinner, Sec'y of Transp. v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 619 (1989).

190. 193 F.3d 72 (2d Cir. 1999).

191. Connecticut's version of CODIS in place at time of the court's decision only required sexual offenders to provide DNA samples. *See id.* at 74.

192. *See id.* at 81.

193. *See id.* at 74.

194. *See id.* at 80.

> in solving both past and future crimes. More importantly, they contend that the statute's requirement that imprisoned sexual offenders provide a DNA sample will deter these individuals from committing future offenses of a similar nature. Balanced against this significant interest is the drawing of a blood sample for testing, an intrusion that the Supreme Court has characterized as minimal.[195]

The *Marcotte* Court felt it important to justify its holding under the special needs test, because as the Supreme Court explained in *Skinner*, if the government has a special need separate from its law enforcement role, it may proceed to search without probable cause.[196] Thus, the *Marcotte* Court believed that if it applied a Fourth Amendment balancing test to Connecticut's version of CODIS, it must first have concluded that Connecticut was acting for a law enforcement purpose and that any search would require probable cause or "at the very least some quantum of individualized suspicion."[197] Because obtaining CODIS DNA samples never entails individualized suspicion, the Court determined it was intellectually dishonest to justify CODIS under a Fourth Amendment balancing test.

c. The Supreme Court Reasserts The Paradigm

Some might argue that the Fourth Amendment's balancing test and special needs test create exceptions that swallow the Fourth Amendment's mandate that the government must obtain a warrant to search. Two Supreme Court cases cut against this argument, however. First, the Court, in *City of Indianapolis v. Edmond*,[198] reaffirmed the general rule that if a search or seizure's primary purpose is for general law enforcement, then the police must honor the Fourth Amendment's warrant requirement.[199]

In *Edmond*, the city of Indianapolis conducted roadblocks to temporarily detain vehicles so drug-sniffing canines could sniff a vehicle's exterior and police could observe the vehicle's occupants.[200] If a dog made a "hit" or if police officers on the scene had reason to believe drugs were in

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195. *Id.* at 79.

196. *O'Connor v. Ortega*, 480 U.S. 709 (1987) and *Griffin v. Wisconsin*, 483 U.S. 868 (1987), also concluded that special needs other than the needs of normal law enforcement will make a search unsupported by either a warrant or probable cause reasonable.

197. *Marcotte*, 193 F.3d at 77 (internal citations and quotations omitted).

198. 531 U.S. 32 (2000).

199. *See id.*

a vehicle, they would then search the vehicle.[201] The Court ruled the primary purpose of looking for drugs was nothing more than a general law enforcement stop, and it distinguished this case from previous decisions where the Court allowed police roadblocks to check for valid licenses and registrations or drunk drivers.[202] In those cases, the Court said the primary purpose of the roadblocks was a general safety concern: only qualified, unimpaired drivers should operate motor vehicles.[203]

Second, the Court, in *Ferguson v. City of Charlestown*,[204] struck down a state hospital's regulation that required the hospital to give prosecutors positive drug tests done on urine samples from pregnant women.[205] The hospital justified its actions, because its employees had noticed many expectant mothers that came to the hospital for state provided pre-natal care also abused drugs.[206] To deter this drug use, the state hospital announced its plan to test expectant mothers for drug use and provide positive test results to local prosecutors.[207]

The Court applauded the social goal of reducing drug use, but found the hospital's plan violated the Fourth Amendment. In essence, the state hospital conducted warrantless and suspicionless searches of urine and used the results of the search for a law enforcement purpose, even though the eventual goal was to deter drug use.[208] Such a result could not qualify as a special need because of the plan's entanglement with law enforcement.[209] The Court then paradoxically said the state hospital's plan could also not meet the Fourth Amendment reasonableness standard under a bal-

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200. The Court stated the roadblock stop amounted to a seizure, but that the drug-sniffing canine on a vehicle's exterior did not amount to a search. *See id.* at 40 (internal citations omitted).

201. *See id.*

202. The Court said it was not ruling on roadblocks where a secondary purpose of the stop may be to search for drugs. Thus, for police to avoid the Court's holding, a roadblock's primary purpose could be to permissibl check a license and registration, and its secondary purpose could be to detect drugs. The Court mentioned this possibility when it noted courts decide a roadblock's primary purpose. *See id.* at 46-7.

203. *See id.*

204. 532 U.S. 67 (2001).

205. *See id.*

206. *See id.* at 69.

207. The Court assumed the tested women did not provide informed consent to this practice. *See id.* at 76.

208. *See id.* at 82.

ancing test because the Court had used that test to uphold only the roadblock seizures.[210]

d. The General Prohibition Against Law Enforcement Searches Without a Warrant and CODIS

Given the reemergence in Supreme Court cases prohibiting general law enforcement searches without a warrant, convicted felons continue to challenge CODIS. Three separate federal district courts reviewed CODIS in published decisions after *Ferguson* and *Edmond*.[211] The district courts split their decisions, one court ruling that the federal version of CODIS was unconstitutional, while the other two courts continued to find CODIS constitutional.

In *United States v. Miles*, the court considered the various purposes of CODIS and determined its primary purpose was for law enforcement (that is, to accurately solve crimes).[212] Accordingly, *Miles* (a Ninth Circuit district court decision) found *Edmonds* and *Ferguson* overruled *Rise*, and found CODIS unconstitutional, because it required an individual to submit to a warrantless and suspicionless search for a general law enforcement purpose.[213] In *United States v. Reynard*, however, another court agreed

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209. The Court distinguished why this drug case did not qualify under the special needs test as had other drug cases as follows:

> This case differs from the four previous cases in which we have considered whether comparable drug tests "fit within the closely guarded category of constitutionally permissible suspicionless searches." In three of those cases, we sustained drug tests for railway employees involved in train accidents, for United States Customs Service employees seeking promotion to certain sensitive positions, and for high school students participating in interscholastic sports. In the fourth case, we struck down such testing for candidates for designated state offices as unreasonable.

Id. at 87 (internal citations omitted).

210. *See id.* at 84. This statement must surely come as a surprise to all courts that use the balancing test to determine government reasonableness in the absence of a warrant, but when probable cause is nonetheless present.

211. *See, e.g.*, United States v. Miles, 228 F. Supp. 2d 1130 (E.D. Cal. 2002); United States v. Reynard, 220 F. Supp. 2d 1142 (S.D. Cal. 2002); Groceman v. United States, No. 3:01-CV-1619-G, 2002 U.S. Dist. LEXIS 11491 (N.D. Tex. 2002); and Pardue v. Johnson, No. 2:00-CV-0424, 2002 U.S. Dist. LEXIS 14699 (N.D. Tex. 2002).

212. 228 F. Supp. 2d 1130 (E.D. Cal. 2002).

213. *See id.*

with *Miles* that the Supreme Court had effectively overruled *Rise*, but found that the government nevertheless met the special needs test by relying on *Marcotte*.[214] Specifically, *Reynard* found CODIS's purposes go beyond normal law enforcement by, *inter alia*, having probationary officers or prison personnel draw the blood samples instead of police, and that trying to exonerate the innocent was not a normal law enforcement function.[215]

3. The Supreme Court and Fingerprints

Today, most in American society recognize that on arrest, law enforcement takes an arrestee's fingerprints and a "mug shot." Law enforcement then enters this information into various searchable databases using the NCIC.[216] It was not until 1969, however, that the Supreme Court held that taking an arrestee's fingerprints did not violate the Fourth Amendment's prohibition against unreasonable searches.[217] Specifically, *Davis v. Mississippi* held that a person does not enjoy a reasonable expectation of privacy in the oily residue left by a fingerprint.

A person does not reasonably enjoy this expectation of privacy, the Court explained, because "fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search."[218] Thus, to the extent an individual goes about daily affairs and leaves traces of his or her fingerprints behind, law enforcement can seize those fingerprints. Fourth Amendment jurisprudence, however, is seldom so straightforward. *Davis* also held that even though there is no reasonable expectation of privacy in a fingerprint, the police must not violate the Constitution or the law when getting the print.[219] For example, if the police illegally detain a suspect in violation of the Fourth Amendment, then a

214. 220 F. Supp. 2d 1142 (S.D. Cal. 2002).

215. *See id.* The author's opinion is *Reynard* and *Marcotte* use strained logic under the special needs test so that the governmental interest outweighs the individual's privacy interest. For example, most agree that law enforcement's function is to convict the guilty and clear the innocent. To split this dual purpose by saying exonerating the innocent goes beyond normal law enforcement appears contrary to *Ferguson*, *Edmonds*, and common sense.

216. *See* text at infra Part II.C.

217. *See* Davis v. Mississippi, 394 U.S. 721 (1969).

218. *See id.* at 727.

219. *See id.*

defendant can successfully exclude from evidence fingerprints taken during the illegal detention.[220]

Davis went on in dicta to suggest that a detention done solely to obtain a person's fingerprints when there was less than probable cause to support the detention was not unlawful in every case (although there was a constitutionally deficient detention in *Davis*).[221] *Davis* explained that if law enforcement adopted "narrowly circumscribed procedures" to obtain fingerprints during a criminal investigation, it could detain individuals at convenient times for a short period to obtain fingerprints.[222] Some jurisdictions have in fact implemented such procedures upon a showing of reasonable suspicion.[223]

B. The Fourth Amendment Paradigm Applied to the DOD's DNA Databank

The compulsory taking of a service member's blood by the government clearly implicates the Fourth Amendment.[224] The government's purpose in taking the blood sample for the DNA database is to identify human remains when, because of severe trauma or degradation, more traditional identification methods cannot provide conclusive identification.[225] Because the taking is wholly unrelated to any crime, the government's purpose must satisfy the special needs test before the taking of blood is reasonable under the Fourth Amendment.[226]

The government's purpose meets this high standard. The Supreme Court repeatedly has said the taking of blood is a minor intrusion of the person.[227] Weighed against the legitimate government interest in accurately identifying the remains of those who die serving their country, the taking of blood is reasonable under the Fourth Amendment.[228] That, however, cannot end our inquiry, because as the Supreme Court noted in *Skin-*

220. *See id.*
221. *See id.*
222. *See id.*
223. *See, e.g.*, ARIZ. REV. STAT. § 13-3905(A) (West 1999).
224. *See* Schmerber v. California, 384 U.S. 757 (1966).
225. *See supra* Part III.A.
226. *See* Roe v. Marcotte, 193 F.3d 72 (2d Cir. 1999).
227. *See* Skinner, Sec'y of Transp. v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 625 (1989).

ner, the chemical analysis of a body fluid sample also implicates the Fourth Amendment.[229]

The DNA molecule makes up genes, chromosomes, and the human genome. The mapping of the human genome and the eventual cracking of the DNA code coupled with scientists' study of human proteome will reveal almost everything there is to know about an individual on a biological level.[230] Thus, the Supreme Court's observation in *Skinner* that a urine sample can tell others if the donor is pregnant, epileptic, or diabetic, which consequently raises a reasonable expectation of privacy in that sample, is exponentially true regarding a DNA sample from blood.[231] Thus, the DOD's taking of the service member's blood is a classic example of a seizure,[232] but the subsequent DNA analysis of the blood sample requires a distinct Fourth Amendment analysis because of an individual's retained privacy interest in a bodily fluid sample that "reveal[s] a host of medical facts . . . ."[233] This result is true to *Davis*'s reasoning, because DNA analysis probes into a person's private, albeit genetic, life.

If the DOD eventually does a DNA analysis of an AFRSSIR blood sample to identify remains, the special needs test would find that search reasonable under the Fourth Amendment, as explained above. The special needs test, however, would also necessarily find unreasonable a warrantless DNA analysis of an AFRSSIR blood sample done by law enforcement to help solve a crime. As *Ferguson* and *Marcotte* explain, the special needs test only justifies a search whose primary purpose is not law enforcement.[234] Helping to solve a crime squarely meets the definition of a gen-

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228. *See* Mayfield v. Dalton, 901 F. Supp. 300 (D. Haw. 1995), *vacated*, 109 F.3d 1423 (9th Cir. 1997) (to the authors' knowledge this is the sole case that has considered the issue. The Ninth Circuit, however, vacated the decision because the case was moot). *See supra* note 70.

229. *See Skinner*, 489 U.S. at 616.

230. *See supra* Part II.

231. *See Skinner*, 489 U.S. at 616.

232. See *supra* note 167, where the Supreme Court explained it did not need to distinguish between a search and seizure of a bodily fluid sample because the government was taking the sample to immediately search it. The DOD initially takes the sample, however, to store it, not search it. *See supra* Part III.A.

233. *See Skinner*, 489 U.S. at 617.

234. *See supra* Parts V.A.1 and V.A.2.b-d.

eral law enforcement purpose, and therefore, a governmental search based on that purpose done without a warrant violates the Fourth Amendment.[235]

A balancing test approach applied to a law enforcement search of an AFRSSIR blood sample would likewise violate the Fourth Amendment unless done pursuant to informed consent to search or a valid search warrant or authorization. The Fourth Amendment's balancing test requires probable cause, or at least individualized suspicion, coupled with circumstances that would defeat the purpose of securing a warrant.[236] In almost every case, law enforcement could obtain a search warrant for a specific service member's AFRSSIR blood sample without time degrading the DNA sample already in law enforcement's possession. Moreover, if a court applied a Fourth Amendment balancing test outside the bounds of a roadblock or exigent circumstances, the individual's privacy interest in his or her DNA sample must trump law enforcement's "solve a crime" purpose pursuant to *Edmonds* and *Ferguson*.[237]

Finally, courts determine a reasonable expectation of privacy based on a totality of the circumstances.[238] A court should therefore consider the involved steps the DOD has taken to assure service members they have a reasonable expectation of privacy in their stored blood samples at AFRSSIR: the DOD has promulgated a directive requiring, *inter alia*, a court order before law enforcement may seize an AFRSSIR sample;[239] and the DOD opted out of the "blanket uses" of systems of records under the Privacy Act, including a law enforcement use.[240] Under the Supreme Court's

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235. This conclusion implicitly criticizes the reasoning, but not necessarily the result, of the cases cited in Parts V.A.2.a, b, and d because each of those courts stopped their analysis of an individual's privacy concerns with the minimal intrusiveness of taking a blood sample. *Skinner* teaches, however, that when the body fluid sample reveals medical information about an individual, the privacy analysis should not stop at how the government gained the sample. *See Skinner*, 489 U.S. at 617.

236. *See* Schmerber v. California, 384 U.S. 757 (1966).

237. *See supra* Part V.A.2.c.

238. *See* Katz v. United States, 389 U.S. 347 (1967).

239. *See supra* Part III.A. The DOD authorized the release of a former service member's DNA sample to Pennsylvania state and local investigators pursuant to a federal grand jury subpoena. Based on the author's conclusion that service members retain a reasonable expectation of privacy in their AFRSSIR DNA samples, the DOD should have moved to quash the subpoena. *See supra* note 133. By not challenging the subpoena, the DOD may have inadvertently undercut one factor on which service members could rely when forming a subjective expectation of privacy. For the other reasons cited in this article, however, service members still reasonably hold a subjective expectation of privacy in their AFRSSIR DNA samples.

240. *See supra* note 133 and accompanying text.

subjective prong, a service member could reasonably believe, based on the steps taken by the DOD, that he has an expectation of privacy in his AFRSSIR blood sample.

A court may also properly infer from the DOD's actions that the executive branch's position is that society should recognize this privacy interest. Under the objective prong, some may argue, however, that because forensic DNA analysis involves junk DNA only, this makes the sample more like a fingerprint, and thus, society should not recognize a privacy interest.[241] *Skinner*, however, did not make this distinction when considering the privacy interests in a urine sample,[242] and the evolving knowledge of junk DNA may soon moot this argument.[243] Supreme Court precedent therefore strongly suggests a servicemember has both a subjective and objective expectation of privacy in the AFRSSIR blood sample.

C. The Application of Military Rules of Evidence (MRE) 312(f) to the DOD's DNA Databank Military

Military Rule of Evidence 312(f) provides:

> Nothing in this rule shall be deemed to interfere with the lawful authority of the armed forces to take whatever action may be necessary to preserve the health of a servicemember. Evidence or contraband obtained from an examination or intrusion conducted for a valid medical purpose may be seized and is not evidence obtained from an unlawful search or seizure . . . .[244]

A plain reading of this rule authorizes law enforcement access to an AFRSSIR DNA sample if the drawing of blood for the DNA sample was done for a "valid medical purpose." The Court of Appeals for the Armed Forces couples the phrase "valid medical purpose" with "necessary to preserve the health of the servicemember" to trigger a lawful search or seizure under MRE 312(f).[245] Obviously, the AFRSSIR blood samples are not taken to preserve a service member's health since their purpose is to identify remains; therefore, they are not taken for a valid medical purpose. Thus, neither MRE 312(f) nor any other military rule of evidence provides

241. *See supra* note 59 and accompanying text.
242. *See supra* notes 228-32 and accompanying text.
243. *See supra* note 61 and accompanying text.
244. MCM, *supra* note 8, MIL. R. EVID. 312(f).
245. *See* United States v. Stevenson, 53 M.J. 257, 260 (2000).

law enforcement a basis to seize or search an AFRSSIR DNA sample without a warrant, search authorization, or consent.[246]

VI. Recently Enacted Federal Legislation

On 2 December 2002, President Bush signed Public Law 107-314 into law. Section 1063(a) of that law, now at 10 U.S.C.S. § 1565a, reads as follows:

> DNA samples maintained for identification of human remains: use for law enforcement purposes.
>
> (a) Compliance with court order.
>
> (1) Subject to paragraph (2), if a valid order of a Federal court (or military judge) so requires, an element of the Department of Defense that maintains a repository of DNA samples for the purpose of identification of human remains shall make available, for the purpose specified in subsection (b), such DNA samples on such terms and conditions as such court (or military judge) directs.
>
> (2) A DNA sample with respect to an individual shall be provided under paragraph (1) in a manner that does not compromise the ability of the Department of Defense to maintain a sample with respect to that individual for the purpose of identification of human remains.
>
> (b) Covered purpose. The purpose referred to in subsection (a) is the purpose of an investigation or prosecution of a felony, or any sexual offense, for which no other source of DNA information is reasonably available.
>
> (c) Definition. In this section, the term "DNA sample" has the meaning given such term in section 1565(c) of this title.[247]

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246. *See* MCM, *supra* note 8, MIL. R. EVID. 312(d).
247. 10 U.S.C.S. § 1565a (LEXIS 2004).

This statute fails to address any Fourth Amendment privacy issues raised by the AFRSSIR DNA samples. Before critiquing the statute, however, one should understand how this legislation came about.

This article's first hypothetical is based on a rape and murder case from Fort Hood, Texas. The case received national attention, including the victim's mother going public with her daughter's name and photograph a few weeks before the accused's court-martial.[248] The Army's investigation did not satisfy the victim's mother, and she and her daughter eventually complained to their congressman, John Culberson of Houston, Texas.[249] Congressman Culberson then proposed the above statute in the Bob Stump National Defense Authorization Act Year 2003.[250] Neither the House of Representatives nor the Senate debated the above statute, and President Bush signed it into law unchanged from what Congressman Culberson initially submitted.[251]

A careful reading of 10 U.S.C.S. § 1565a leaves one with many questions and few if any answers. The statute states that the DOD must honor a warrant or search authorization from a federal court or military judge[252] if for a felony or sexual offense, and the AFRSSIR can maintain the sample's integrity. This language is almost identical to that found in paragraph 3.5.1, *DOD Dir. 5154.24*, discussed at Part III.A. Thus, 10 U.S.C.S. § 1565a merely states what has always been the law: the AFRSSIR DNA samples are subject to search and seizure by law enforcement possessing a properly obtained warrant.[253] Neither lawyers nor law enforcement need

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248. *See A Child Who Is 'Not the Same,'* ARMY TIMES, Dec. 16, 2002, at 15-16. At the accused's court-martial for those crimes described in the first hypothetical and other crimes not mentioned, the military judge sentenced the accused to be imprisoned for the term of the accused's natural life without the possibility of parole.

249. *See* John M. Gonzalez, *Victim Assails Army For Not Matching DNA Sooner*, HOUS. CHRON., May 5, 2002, at A37.

250. H.R. 4546, 107 Cong. § 1566 (2002).

251. *See* Tranette Ledford, *Law Expands Access to Military DNA*, ARMY TIMES, Dec. 16, 2002, at 8.

252. The statute does not define "military judge." Giving the term its plain meaning, the DOD may not have to honor search authorizations done by commanders or military magistrates, who generally have the power to order a search or seizure of or on military property based on probable cause. *See supra* note 8.

253. A subpoena should be insufficient. *See supra* note 238.

a statute to tell them a judicial search and seize warrant trumps a reasonably held privacy interest.

The statute fails to address the key issue that brought the rape victim and her mother to Congressman Culberson's office. Can law enforcement get to the AFRSSIR DNA samples without a warrant? One can make arguments on either side of what the statute intended, but the statute, on its face, explicitly fails to say a warrant or court order is the sole way law enforcement may gain access to the AFRSSIR DNA samples.[254] The statute is also silent on its interaction with the Privacy Act and FOIA. If the statute meant to act on the rape victim and her mother's complaint that the Army should have matched the DNA to the suspect or accused via the AFRSSIR DNA samples, it fails to take any steps in that direction.[255] If the statute meant to answer what privacy interests a service member has in his AFRSSIR DNA sample, it also fails to do that. The statute is therefore a "push,"[not a generally recognized term] and we are left analyzing the Privacy Act, FOIA, and the Fourth Amendment to answer the privacy question.

VII. Hypotheticals Revisited

In *Hypothetical 1*, the victim requests the DOD to search its DNA databanks for the forty thousand soldiers stationed at the Army post against the DNA sample taken from the victim's body. In this hypothetical, there is no probable cause or individualized suspicion to justify a search warrant or authorization. Moreover, as explained in Part V.B, service members maintain a reasonable expectation of privacy in their DNA

254. The legislative and executive branch would clearly invade the power of the court if they passed a law that said an individual did not enjoy a reasonable expectation of privacy in a given area or thing. The converse, however, is not necessarily true. The legislature and executive branch could enact a law that said, for example, individuals possess a reasonable expectation of privacy in their garbage no matter the location of such garbage. There is no reason why such a statute would not pass constitutional muster in that legislatures and the executives are free to empower the people with more rights than the constitution provides.

255. A first step would appropriate funds to analyze, "fingerprint," and place in a searchable computer database the over four million DNA samples currently stored by the AFRSSIR. The next step might be to authorize by statute and implementing regulations the placing of a copy of such a database in CODIS or the NCIC, with accompanying Privacy Act legislation and implementing regulations.

samples stored at the AFRSSIR. The state agency's Privacy Act/FOIA request, however, slightly complicates the analysis.

As a practical matter, honoring the request would overwhelm AFDIL, because they could not timely produce a DNA fingerprint from forty thousand blood samples and continue their other work. Second, neither the Privacy Act nor FOIA require an agency to create records in response to a request, and producing the DNA fingerprint from existing blood samples arguably makes a new record.[256] Third, as discussed in Parts IV.A and B, if a service member maintains a reasonable expectation of privacy in a government record, then neither the Privacy Act nor FOIA authorizes that record's release.[257]

Hypotheticals 2 and *3* are questions of degree based on *Hypothetical 1*. *Hypothetical 2* limits the pool of possible suspects to three hundred soldiers, but law enforcement still has no individualized suspicion against any soldier. While three hundred DNA samples for AFDIL analysis and DNA fingerprinting may be manageable, that is not the crux of a Fourth Amendment analysis. Thus, for *Hypothetical 2*, the analysis is the same as *Hypothetical 1*.

Hypothetical 3 is problematic under the Fourth Amendment because it gives the power of foresight. We know there are ten suspects, and one of them will kill in the future if not stopped now. Implicit in constitutional criminal law is a trade off: for the good of the system some guilty go free. Thus, when police illegally seize evidence or illegally obtain a confession, courts generally do not allow the admission of that evidence at trial to deter future police misconduct.[258] Generally, therefore, *Hypothetical 3*'s answer is the same as *Hypotheticals 1* and *2*. *Hypothetical 1*'s answer is not, however, a blanket solution.

Law enforcement has ten suspects in *Hypothetical 3*, and it is reasonable to assume that in a few days their investigation will establish alibis for most of the ten suspects. Police would then have individualized suspicion against one or two soldiers, and most likely in the near future could obtain a search warrant for the relevant AFRSSIR blood sample. What if, however, some exigent circumstance presented itself at this point (for example, one of the two primary suspects was about to leave the United States to a

256. *See supra* note 141.
257. *See supra* note 140 and accompanying text.
258. *See* Mapp v. Ohio, 367 U.S. 643 (1961).

country with whom the United States did not have an extradition treaty).[259] Not every law enforcement search of an AFRSSIR blood sample is unreasonable without a warrant, for as Justice Jackson said in dissent:

> But if we are to make judicial exceptions to the Fourth Amendment for these reasons, it seems to me they should depend somewhat upon the gravity of the offense. If we assume, for example, that a child is kidnaped [sic] and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be a drastic and undiscriminating use of the search. The officers might be unable to show probable cause for searching any particular car. However, I should candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime. But I should not strain to sustain such a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger.[260]

Thus, in almost every case, law enforcement should obtain a warrant to perform a DNA analysis of a service member's AFRSSIR blood sample. Exigent circumstances coupled with individualized suspicion, however, could make a warrantless law enforcement search reasonable under the Fourth Amendment. That being said, *Hypothetical 3* does not present facts that trigger this exception to the general rule.

VIII. Conclusion

Our knowledge of the DNA molecule evolves and expands. Today, and even more so in the foreseeable future, the DNA molecule will reveal many medical and biological facts about the individual from whom the molecule came. Supreme Court precedent shows that individuals have a reasonable expectation of privacy in their bodily fluids when the chemical analysis of those fluids may reveal personal facts about the individual, even when the specific chemical analysis done does not reveal those facts. Moreover, steps taken by the DOD lead service members to believe they have a privacy interest in their DNA blood samples. Thus, service mem-

259. Assume for the sake of argument that the soldier could freely leave. Obviously, a commander would likely order the soldier not to leave post.

260. Brinegar v. United States, 338 U.S. 160, 183 (1949).

bers retain a reasonable expectation of privacy in their blood samples given to the AFRSSIR for possible future DNA analysis to identify their remains.

This conclusion is important, for it precludes release of the AFRSSIR samples under the Privacy Act and FOIA, provides a basis to quash a subpoena seeking a AFRSSIR blood sample, triggers a Fourth Amendment analysis when law enforcement wants to obtain a DNA fingerprint from an AFRSSIR blood sample, and precludes a *Davis* reasonable suspicion standard to get at the AFRSSIR blood samples. In almost every case, the Fourth Amendment requires law enforcement to obtain a warrant or search authorization before they may perform a DNA analysis on an AFRSSIR blood sample. Unfortunately, existing federal legislation to protect a service member's privacy interest in his or her AFRSSIR blood sample is inadequate. To protect this interest, Congress and the President should enact legislation making the misuse of the AFRSSIR blood samples criminal, as they have done with DNA samples in CODIS and NCIC identification information. Finally, Congress and the DOD, respectively, should amend 10 U.S.C.S. § 1565a and *DOD Dir. 5154.24* to clearly state that only a search authorization by a military judge or search warrant by a federal judge or magistrate satisfies the requirement of a court order.

THE STUDY OF LAW AS A FOUNDATION OF LEADERSHIP AND COMMAND: THE HISTORY OF LAW INSTRUCTION AT THE UNITED STATES MILITARY ACADEMY AT WEST POINT*

COLONEL PATRICK FINNEGAN†

I never discussed the Constitution very much, and I never made many speeches upon it, but I have done a good deal of fighting for it.

—Lt. Gen. Philip Sheridan[1]

The study of law at the U.S. Military Academy is almost as old as the Academy itself. Fourteen years after Congress established the school at West Point in 1802, Academy regulations prescribed that "a course in Ethics shall include Natural and Political Law."[2] Two years later, Congress passed a statute providing for "one Chaplain stationed at the Military Academy at West Point who shall be Professor of Geography, History and Ethics, with the pay and emoluments allowed a Professor of Mathematics."[3] The resulting Department of Geography, History, and Ethics, headed by the Chaplain, the Reverend Doctor Thomas Picton, became the fourth established academic department, following the Departments of Philosophy, Mathematics, and Engineering.[4] Since those early days when the Chaplain was charged with teaching natural and political law, the Academy has maintained required courses in the study of law as an essential part of the preparation and education of future officers.

Early Subjects and Texts

Although the newly established department began teaching geography, history, and ethics in 1818, there is no record that any law instruction was actually given before 1821, when Monsieur De Vattel's *The Law of Nations*,[5]a treatise on international law, was adopted as a textbook.[6] An 1823 Military Academy Regulation prescribed that First Class cadets (seniors) would attend four hours of this instruction every week.[7] The Chaplain and the other officers who assisted him, although not lawyers, also taught moral philosophy, the origin of civil society, principles of civil liberty, modes of civil government, and constitutional law, in addition to the law of nations.[8] The study of natural and political law was intended to

foster the intellectual and cultural growth of the cadets, as well as to develop their reasoning ability and instill in them the basic principles of a society based on the rule of law.[9]

As the study of law evolved in West Point's early years, cadets studied a variety of topics and read from multiple sources. From 1821 to 1842, the various chaplains and professors adopted the Reports of the United States Supreme Court as addenda to the textbooks.[10] The study of American constitutional law replaced natural law (which emphasized international law) in 1827, but by 1838 the course of study in law provided for instruction in both constitutional and international law.[11] During this period, William Rawle's *A View of the Constitution of the United States of America*[12] may have been studied by some cadets in the late 1820s, but it was never officially adopted as a textbook.[13] Rawle's treatise concluded that a state has a legal right to secede from the Union, and this was most likely the basis for the post-Civil War argument that West Point had taught "secession" for decades and thus was responsible for many West Point graduates fighting for the Confederacy.[14] Although it is impossible to know the precise extent of Rawle's influence, his ideas had a profound effect on at least some cadets. Gen. Robert E. Lee, Class of 1829, confided in Bishop Joseph Wilmer of Virginia that, if he had not read Rawle's work as a cadet, he would never have left the Union.[15]

Rawle's book was in use for less than two years before James Kent's well-known *Commentaries on American Law* replaced it in 1828.[16] The latter volume, covering both international and constitutional law, remained in use as a textbook at the Academy for over 30 years.[17] Rather than arguing that the states had a right to secede, Kent concluded that the distinguishing feature of the U.S. Constitution was to bind the states in union with each other. In this regard America's constitutional system differed markedly from the political system that prevailed under the Articles of Confederation, which allowed states to effectively veto proposals or ignore policies of the central government.[18] Ever since constitutional law was introduced into the curriculum in 1827, it has been a required course and an essential part of the professional education of cadets who upon commissioning swear to support and defend the Constitution. Hence, except for a brief period during which a secessionist viewpoint appeared in a book available to cadets, the Academy's law curriculum was unequivocal in

emphasizing the legitimacy of the Constitution and the inviolability of the Union.

The Antebellum Period and the Civil War

Although the Academy emphasized law instruction during its first 50 years, unfortunately none of the teachers were lawyers. Had lawyers been available, the instruction certainly would have been better, but there were simply not enough lawyers in the Army to justify assigning them to the faculty. Tellingly, the same Act of 16 March 1802 that established the U.S. Military Academy abolished the position of Judge Advocate of the Army.[19] When the Army needed judge advocates, Congress would periodically pass statutes providing for their inclusion in the force structure, but from 1821 until 1849, there were no statutory enactments related to judge advocates and no full-time lawyers in the Army.[20] hen judge advocates were needed for courts-martial, the Army typically would appoint line officers to fill the duty temporarily.[21] Congress finally reestablished the position of Judge Advocate of the Army in 1849; 13 years later, as the Army expanded to fight the Civil War, Congress enacted legislation creating the Judge Advocate General's Corps.[22]

The Military Academy worked hard to refine the law curriculum despite the unavailability of Army lawyers as instructors. With so few judge advocates in the Army, the need for line officers to understand and apply the principles of law became even more apparent. In 1858, the Academy instituted the study of military law, which included the Rules and Articles of War, criminal law, and evidentiary procedures for courts-martial.[23]

Nine years later, the Academic Board discontinued instruction in the subjects of geography, history, and ethics and directed the Chaplain to focus solely on the teaching of international, constitutional, and military law.[24] During this period, the instruction emphasized the relation of law to moral values, as well as philosophical aspects of international and constitutional law.[25] Military law, a subject of great professional interest to future Army officers, included study of War Department General Order 100 of 1863, in which Francis Lieber codified, for the first time in history, a compilation of the Laws of War.[26]

As the American military became more professional in the mid 19th century, the benefits of understanding military law were clear. There were never enough qualified Army lawyers in the field, and line officers there-

fore assumed greater responsibility in meeting legal requirements and in courts-martial. To help address the legal needs of the Army, the Board of Visitors of the Military Academy recommended in 1849, and again in 1858, that a separate Department of Law be established.[27] Congress finally acted on those recommendations in 1874, over 50 years after the start of law instruction at West Point.

The Department of Law, 1874–1908

The establishment of the Department of Law reflected the Army's priority on improving the officer corps's legal skills. The 1874 statute authorized the Secretary of War to "assign one of the senior Judge Advocates of the Army to be Professor of Law."28 This was a significant step, considering that the Congress had passed another law that year which reduced the Judge Advocate General's Corps from a total of eight officers to four.29 The latter law was part of a major compilation of U.S. statutory law that included a reorganization of the Army Staff, revision of the Articles of War of 1806, and reduction in the size of the Army to 25,000 men.[30] Additionally, the law authorized a new type of wartime court-martial, known as the field officer's court and run by commissioned officers.[31] These statutory innovations underscored the importance of continued and improved instruction in law at West Point, and they may have significantly influenced the decision to assign 25 percent of the Judge Advocate General's Corps to the Academy.[32]

The *Army and Navy Journal*, a leading service publication, called the law "a step in the right direction" and summed up the rationale for its unanimous passage:

> The study of the general principles of law . . . and the study of the Constitution of the United States and of the administration of justice in the Army . . . have, since the Rebellion, become matters of primary importance [for] every individual holding a military commission.[33]

The Civil War and Reconstruction highlighted the need for commissioned officers to be savvy practitioners of military law. They had to be able to enforce court processes while protecting civil liberties, as well as to understand rules of evidence, courts-martial procedures, and military criminal

justice. In light of these requirements, the *Journal* concluded, "The necessity for such a department seems to have been long felt."[34]

The professors who headed the new Department of Law were distinguished scholars and soldiers who made significant contributions to the Academy and the nation. The first Professor of Law (and the first lawyer ever to teach law at the Military Academy) was Maj. Asa Bird Gardiner, appointed to the position on 29 July 1874.[35] An 1860 graduate of New York University Law School, he gave up his legal practice to fight for the Union in the Civil War.[36] He was wounded in an engagement at Carlisle, Pennsylvania, in 1863 and was awarded the Medal of Honor for action during the Battle of Gettysburg.[37] President Ulysses S. Grant appointed Gardiner as a major in the Judge Advocate General's Corps in 1873; one year later, the Secretary of War named him Professor of Law.[38]

Gardiner initiated numerous curricular changes. He sharpened the focus on military law and the law of war, including systematic study of the Lieber Code as a supplement to the course on international law.[39] His text on court-martial forms and procedures became the basis for teaching cadets the rudiments of the military court-martial system.[40] Gardiner discontinued the use of Kent's *Commentaries*, which cadets had been using for 30 years, substituting a new work on constitutional law[41] by respected scholar Professor John Norton Pomeroy.[42]

Although his tenure lasted only four years, Gardiner's contributions were significant. e had organized the new department, mentored instructors, taught cadets, designed courses, and wrote textbooks. e earned more enduring fame, however, for his work after he left the Department of Law. In 1881, he served as prosecutor in the memorable case of Cadet Johnson C. Whittaker, who claimed that he had been attacked and mutilated by masked assailants.[43] Academy leaders believed that Whittaker had faked the attack in an effort to avoid taking final examinations.[44] Gardiner's skill as a prosecutor helped convince the court-martial to convict Whittaker, despite relatively ambiguous evidence.[45] Perhaps in recognition of that skill, Gardiner was selected in 1884 to prosecute charges brought against the Judge Advocate General of the Army, Brigadier General David Swaim, for fraud and conduct unbecoming an officer.[46] That prosecution also resulted in a conviction.[47]

Maj. Guido Norman Lieber, son of Dr. Lieber, author of the Lieber Code, succeeded Gardiner in 1878.[48] Lieber graduated from Harvard Law School in 1858 and served with distinction during the Civil War. Besides

serving as aide-de-camp to the General-in-Chief, Gen. Henry Halleck, he received two brevet promotions for gallantry.[49] Following the war, he served tours as Judge Advocate for Army Departments and Divisions ranging from the Atlantic to the Dakotas.[50] As Professor of Law, Lieber introduced Rollin A. Ives's *A Treatise on Military Law*[51] and replaced Pomeroy's text on constitutional law with a textbook by Judge Thomas M. Cooley[52]that remained in use for almost 20 years.[53] After four years, Lieber left West Point to become the Assistant to the Judge Advocate General, Brig. Gen. Swaim.[54] Following the latter's 1884 court-martial conviction, Lieber was appointed Acting Judge Advocate General in the rank of brigadier general and early the next year named Judge Advocate General.[55] He retired from the Army in 1901, after serving 16 years as the Judge Advocate General, the longest tenure of any of the 36 officers who have held that position.[56]

Following the relatively uneventful tenure of Lt. Col. Herbert Curtis from 1882 to 1886, the Judge Advocate General appointed Lt. Col. William Winthrop as Professor of Law. Winthrop, an 1853 Yale Law School graduate, had served with distinction during the Civil War. Commissioned in the infantry, he was wounded several times and promoted to captain for gallantry before becoming a judge advocate.[57] Prior to his assignment as Professor of Law, he completed the revision of the 1806 Articles of War, which Congress approved in 1874. Additionally, he published *Military Law*,[58] the first major scholarly compilation of military law cases and principles of the United States.[59] When he served as Professor of Law from 1886 to 1890, *Military Law* was introduced as the cadet textbook on military law.[60] Winthrop returned to Washington after his tenure at West Point, where he served as deputy to Acting Judge Advocate General Lieber and ultimately as Assistant Judge Advocate General.[61] Upon retirement in 1895, after almost 34 years service, Winthrop updated his treatise and renamed it *Military Law and Precedents*.[62] That text became the most influential book ever written on military law, as it preserved and codified more than a century's worth of military jurisprudence and established a tradition of careful legal scholarship for military attorneys.[63] His text in still quoted in military law cases and has been cited many times in opinions of the United States Supreme Court. It was so authoritative that the War Department issued reprint editions in 1920 and 1942, despite the lapse in time since its first publication in 1886.[64]

For more than a decade straddling the turn of the century, the Department of Law reunited with the discipline of history. In 1896, after the death of Professor (Chaplain) Postlethwaite, the Department of Geography, His-

tory, and Ethics was discontinued and the Chaplain no longer had academic duties.[65] The study of history moved to the newly named Department of Law and History until 1908, when it migrated anew to the Department of English and History.[66]

Col. George B. Davis, West Point's most renowned Professor of Law, became department head in 1896. As an enlisted soldier and junior officer in the Civil War, Davis had distinguished himself in the Army of the Potomac, participating in more than 25 battles and engagements.[67] After the war, barely 18 years old, he entered West Point from the ranks, graduating in 1871 as the First Captain of the Corps of Cadets.[68] He fought the Apache Indians on the frontier before returning to West Point in 1883 for the first of three tours there that would total 16 years.[69] As a faculty member, his primary responsibility was to instruct on law, but he also taught Spanish, French, mineralogy, geology, history, ethics, and geography.[70]

Colonel Davis greatly influenced law instruction at West Point. While Professor of Law, he wrote texts on military law and courts-martial, the basic elements of law, and the elements of international law.[71] The latter two texts remained in use in the department for over 20 years.[72] Cadets respected Davis for his ability to combine his vast knowledge of law with ample doses of practical experience as a soldier. His intellect, patience, and good humor could make any subject interesting.[73]

Davis firmly established the core curriculum in law during his tenure. In their First Class year, cadets would take two courses of one semester each: Elementary and Constitutional Law in the first semester, and International and Military Law in the second.[74] Cadets attended those law classes for two hours each Monday, Wednesday, and Friday afternoon. [75] Davis's law curriculum, with occasional minor adjustments, remained in place for almost a century, until a reorganization of the curriculum in 1989.

In 1901, Colonel Davis left West Point with a promotion to brigadier general and an appointment as the Judge Advocate General of the Army, a position he held for nearly ten years.[76] During that time, he represented the United States as Delegate Plenipotentiary to the Geneva Conferences of 1903 and 1906, and the Hague Conference of 1907, all of which were landmarks in international agreements and codification of rules and laws for warfare.[77]

The refinement of the law curriculum since the formal establishment of the Department of Law was showcased during the Spanish American

War and its aftermath. West Point graduates, relying in large part on the law instruction they received as cadets, successfully administered martial law, organized and conducted civil affairs, and facilitated the establishment of civil governments in Cuba, Puerto Rico, and the Philippines.[78] The Department of Law had proved its worth in helping West Pointers combine intellectual understanding of the principles of law with practical guidance that proved useful in confronting military legal issues.

Shifts in Emphasis, 1908–1946

Gradual change characterized the law curriculum in the first quarter of the 20th century. Although course content varied little, instructor emphasis shifted gradually from the theoretical toward the more practical application of the law.[79] Additionally, whereas constitutional law continued to be a core course, the department dropped the subject of international law from required instruction, since it had less practical utility.[80] In place of the latter offering, the Department of Law in 1921 added instruction in criminal law and evidence, which provided cadets greater concentration of study in topics relevant to their military careers.[81] Under the court-martial system, line officers had significant responsibilities as court members, prosecutors, and defense counsel, and their West Point law education helped to prepare them for those responsibilities.[82]

The Department of Law coupled education with training. Beginning around 1915, it conducted military moot courts to enhance cadets' understanding of the roles they would have as officers in courts-martial.[83] The new officers had plenty of opportunities to use what they learned. Following World War II when occupied countries were under martial law, recent West Point graduates wrote to cadets advising them to save every book and pamphlet from the Department of Law and to memorize everything they were learning.[84] West Pointers typically were the "only officers with legal training to be found in a unit — especially in the occupied territories."[85] Lt. Gen. Frank S. Besson, Jr., a 1932 USMA graduate who served in both the European and Pacific Theaters during World War II, recalled the importance of his instruction in law:

> A knowledge of the basic principles of law has been invaluable to me in my military service. I believe that in my day-to-day administrative problems, no single subject taught to me at the Military Academy with the exception of English has been more directly applicable.[86]

Gen. Andrew J. Goodpaster, a member of the Class of 1939 who later served as Supreme Allied Commander, Europe, and as Superintendent of the Military Academy, had a similar perspective:

> I have found over the years that my law course was of very great value to me. . . . [A]n understanding of the principal structure of law is essential equipment for an Army officer if he is to be effective within a unit, on higher staff, or as a military representative in the highest circles of government.[87]

The reputation of the department among cadets and in the legal profession during this period continued to be excellent. Cadets noted that studying law developed the capacity to think logically, stimulated intellectual curiosity, imparted a sense of values, and taught the application of knowledge to practical problems.[88] The 1935 edition of the *Howitzer*, the cadet yearbook, noted:

> The Law Department in setting its precedent did something at once radical and unique, something which causes the First Classman to wonder, to marvel, and then to rejoice. It allowed the cadet freedom of speech and freedom of thought such as no other department has ever done. The cadet became an individual not only in point of grading but also in point of mental action and self-expression. Response was spontaneous and profitable both to department and to cadet alike.[89]

Reflective of the fine reputation of the Department of Law was the decision of the American Bar Association (ABA) in 1941 to recognize high-achieving cadets. The ABA award, presented annually to the graduating cadet with the highest standing in law, continues to this day.[90]

Although all Professors of Law and some of the assistant professors were lawyers, a large part of the department's faculty still consisted of line officers. In an effort to ensure high standards of teaching, the Law Department began sending its officers who were not lawyers to receive training at law schools.[91] Between 1915 and 1953, members of the department attended courses at Columbia, Georgetown, Virginia, Yale, and The Judge Advocate General's School in Charlottesville, Virginia.[92] Many of these non-lawyer officers, benefiting from their experience teaching law, went on to serve the Army in significant leadership positions. Among them is Capt. Frederick Irving, a member of the West Point Class of April 1917, an infantry officer who taught in the department from 1922 to 1924.[93] From

1941 to 1942, Brigadier General Irving returned to West Point as the commandant of cadets, and, after serving as the 24th Infantry Division Commander in World War II and in other important leadership positions in the Army, he returned yet again to West Point as Major General Irving to serve as Superintendent of the Military Academy from 1951 to 1954.[94] Major General Irving is the only person in the history of West Point who has served as an instructor in an academic department, commandant, and superintendent.[95]

Two former Professors of Law served with great distinction during World War I. In 1917, when General Pershing was chosen to command the American Expeditionary Force in France, he selected Col. Walter Bethel, Professor of Law from 1909 to 1914, to be his judge advocate.[96] Colonel Bethel held that position throughout the war, participating in the Meuse-Argonne offensive and receiving the Distinguished Service Medal; subsequently he served as The Judge Advocate General of the Army from 1923 to 1924.[97] Col. Edward Kreger, who had been awarded the Distinguished Service Cross for heroism in battle in the Philippines, followed Colonel Bethel as the Professor of Law, a position he held from 1914 to 1917, when he was assigned as the Judge Advocate General's representative to the American Expeditionary Force and received the Distinguished Service Medal for his outstanding service.[98] Following the war, Colonel Kreger supervised the writing of the 1921 *Manual for Courts-Martial* and was appointed The Judge Advocate General of the Army in 1928.[99]

Continuation and Expansion, 1946–1989

From the time the Department of Law was established in 1874, the Professor and Department Head was an officer of the Judge Advocate General's Corps detailed to the Academy for a regular tour of duty.[100] As was the case for all Army lawyers, his assignment and tour length were determined by the Judge Advocate General of the Army.[101] A change came in 1946 when Congress authorized a permanent Professor of Law at West Point; henceforth the Head of the Law Department would be a tenured professor equivalent in academic rank to the heads of the other academic departments.[102] Moreover, selection of Professors of Law would follow the same statutory and regulatory procedures as those for other department heads. Once the Senate confirmed the selection, the Professor of Law would leave the Judge Advocate General's Corps and become part of the Corps of Professors.[103] Like other tenured professors, Professors of Law may remain on active duty until their 64th birthday and, at the discretion

of the President, may retire in the grade of brigadier general in recognition of "long and distinguished" service.[104]

Col. Charles W. West, who had served as Professor of Law since 1943, was selected as the first permanent Professor in 1946 and served in that position until his retirement in 1962.[105] His 19 years as Professor of Law is the longest tenure of any officer who has held that position. Colonel West enhanced the professional competence of the faculty by mandating, with the concurrence of the Judge Advocate General, that all officers serving in the Law Department be fully qualified lawyers and members of the Judge Advocate General's Corps.[106] In 1953, 79 years after Congress authorized the Secretary of War to appoint an Army lawyer to head the Department of Law, all instructors were members of the bar for the first time in the history of the department.[107]

The Department of Law adjusted its curriculum in the early 1950s to keep pace with Congressionally mandated changes in the military judicial system. The 1951 Manual for Courts-Martial, promulgated after Congress passed the Uniform Code of Military Justice, included significant military justice roles for line officers. Because they would be involved in investigating, processing, prosecuting, and defending cases at courts-martial, law instruction placed heavy emphasis on familiarizing cadets with the framework of the military justice system.[108] By 1953, the law faculty (now consisting of the Professor of Law, an associate professor, an assistant professor, and nine instructors[109]) taught First Class cadets a two-semester course centered on the subjects of constitutional law, criminal law and evidence, and military law.[110]

A decade later, as the Academy looked for ways to revise the curriculum, in part to find room for elective courses, the Academic Board considered reducing the instruction in law.[111] In 1963, the Superintendent, Maj. Gen. William C. Westmoreland, ordered a review of the law curriculum. He formed an ad hoc committee and directed its members to analyze three options: maintain the curriculum as currently structured; increase the emphasis on legal training while reducing the emphasis on legal education; or provide minimal law instruction during the academic year under the supervision of the USMA Staff Judge Advocate with supplemental training during summer training periods.[112] Although the orders appointing the committee directed that they make no specific recommendations,[113] the

committee report stated, "It would not be in the best interest of the United States Military Academy to reduce the current coverage of law."[114]

During their study, committee members had sought the advice of prominent military officers familiar with the program of law instruction. Maj. Gen. Charles Decker, a 1931 USMA graduate serving as The Judge Advocate General of the Army, was unequivocal in his support for a strong law curriculum:

> I am convinced that the study of law at West Point *does* contribute to the graduate's overall education and cultural background and *does* materially assist him in solving the military and administrative problems he encounters throughout his military service. If a poll were taken of any group of West Point graduates I believe there would be few dissenting voices. . . . While I believe the [law] course at West Point is essential for other reasons, its inclusion in the curriculum can be justified for its scholarly and intellectual values alone.[115]

Decker noted other benefits of studying law in an increasingly complex and dangerous world. Army officers, he observed, are increasingly drawn "into the legislative and administrative fields of government, international relations, procurement involving . . . billions . . . of dollars, and the direction of large numbers of men and women both in and out of the service."[116] In virtually every field of professional endeavor, a solid grounding in legal education and training would assist Army officers in meeting their responsibilities.

While Major General Decker could be expected to speak in favor of the law curriculum by virtue of his position, other prominent officers who were not lawyers did likewise. For example, General Goodpaster[117] observed,

> I am constantly interested to see that in important areas of the military profession, the fine points turn out to be the key points, and precision of thought is essential. Law certainly conditions and disciplines the mind in that direction. At the same time, an understanding of law in its relation to the Constitution, and hence to the process of self-government in its basic sense, is indispensable in the military profession within a democracy.[118]

In the end, no substantial changes were made in the law program. When Colonel West retired in 1962, he was succeeded by Col. Frederick C. Lough, West Point Class of 1938, who served in North Africa and Italy during World War II.[119] That year the Department of Law consolidated its operations with those of the USMA Office of the Staff Judge Advocate and assumed the responsibility for providing all legal services to the West Point community.[120] Under Lough's tenure, the Law Department began to offer a small number of elective courses to complement the core course in Constitutional and Military Law. By 1974, the department offered electives in Public International Law as well as Business and Procurement Law. Also, for cadets of the First Class, a seminar in Military Aspects of International Law was presented.[121]

During the late 1960s and early 1970s, the Department of Law joined the other academic departments in recognizing the need for permanent military faculty beside the department head. In 1969, the Judge Advocate General established the first of two such positions in the Department to assist with continuity, long term projects, and Academy governance.[122] Judge Advocate General's Corps officers filled these positions, with the intent that they would remain on the faculty until their mandatory retirement. In 1983, for a variety of reasons, a successor Judge Advocate General withdrew support for the permanent positions, with the apparent acquiescence of Col. Robert W. Berry,[123] who had succeeded Colonel Lough as Professor of Law in 1978.[124] The officers filling those jobs were reassigned, and the department head again became the sole permanent faculty member.

Around this time the law faculty, which had been exclusively white male Army officers, became more diverse with the gradual addition of women, minorities, and civilians. In 1979, Capt. Christine Czarnowsky became the first female officer to teach law at West Point, and in 1982 Maj. Nolan Goudeaux was the Law Department's first African-American officer. To assist and mentor military faculty members, to help evaluate the law program, and to reach out to other academic institutions involved in teaching law, the Department began to participate in the Academy's Visiting Professor program in 1979, hosting a visiting professor from a prominent law school or undergraduate institution for a year or semester.[125] The list of visiting professors includes such distinguished names as Prof. Daniel J. Meador of the University of Virginia, Prof. John F.T. Murray of the University of St. Louis, Professor and former Judge Advocate General of the Air Force Walter Reed of the University of South Dakota, Prof. Joseph Conboy of Texas Tech University, Prof. Donald Zillman of the Uni-

versity of Maine, Prof. Stephen Dycus of the University of Vermont, and Prof. Jonathan Lurie of Rutgers University.[126]

The cadet cheating scandal erupting in the spring of 1976 had a significant impact on the Department of Law. Because the department had been consolidated with the Office of the Staff Judge Advocate, many law instructors had to serve as either prosecutors or defense counsel in cases involving cadet cheating.[127] The situation caused potential conflicts of interest, as some law instructors found themselves simultaneously serving the interests of two competing parties—the Academy and the cadets accused of honor violations. After resolution of the cases, the Secretary of the Army appointed a Special Commission on the United States Military Academy (known as the Borman Commission, named after the Commission's Chairman, Frank Borman, former astronaut and member of the Class of 1950).[128] The commission's mission was to study the problems that led to the cheating scandal and recommend ways to correct them. In the course of its deliberations, the commissioners noted the ill effects of using law instructors as military defense counsel: "The system of having the same officer teach law and act as defense counsel places him in the difficult position of appearing to attack the basic policies of the institution to which he owes allegiance is his role as a faculty member."[129] Accordingly, the Commission recommended that "judge advocates who defend cadets should have no teaching duties."[130] In 1977, coincident with the retirement of Colonel Lough and the selection of Colonel Berry as Professor of Law, the Law Department and the Staff Judge Advocate once again separated their functions and offices after 15 years of consolidated activities. The separation remains in effect today.[131]

The law curriculum at West Point has kept pace with changes in the military justice system. Reflecting legal reforms in the civilian sector, the Military Justice Act of 1968 and the subsequent Manual for Courts-Martial revision in 1969 included more legal safeguards for the accused. Henceforth military lawyers—not line officers—would act as prosecutors and defense counsel in virtually all courts-martial, and military judges would preside over the courts.[132] Consequently, cadets no longer needed the heavy emphasis on criminal procedure and evidence that had been previously required to help prepare them to conduct courts-martial. Moreover, the moot courts that had been a part of law instruction since the early 1900s were discontinued by the mid 1970s.[133]

Despite these changes, officers still played key roles in the military justice system. They needed to understand legal principles and procedures

that would be essential for duty as a company grade officer and commander.[134] The law curriculum adapted to this requirement by focusing on practical legal issues such as the rules for lawful searches and safeguards against self-incrimination. The department complemented this instruction with continued emphasis on constitutional law, an understanding of which is essential to officers in a democracy.

Although the instruction continued to emphasize military justice and constitutional law, the total number of lessons was reduced as the Academic Board revised the overall curriculum to create room for additional elective courses. In Academic Year 1978-79, the Academy reduced the core course in law from 80 lessons taught over two semesters to 62 lessons in one semester.[135] In 1985, the course once again became a two semester course, but only two lessons were added, for a total of 64.[136] In the early 1980s, electives in Environmental Law and in Constitutional Law were added to the existing electives in International Law and Business and Government Contracting Law, but the department discouraged cadets from taking more than two law electives.[137] In part, this was because the leadership of the department at that time believed that law courses and electives should supplement other academic areas and concentrations rather than comprise an independent field of study.[138]

New Directions and Challenges, 1989–Present

In the early 1980s, the Academic Board initiated a major review and revision of the curriculum. Significant changes included a reduction in the number of courses required for graduation and the opportunity for in-depth study in academic areas of interest. For the first time, cadets could major in an academic discipline; those who preferred less work in a specific area than a major entailed still could concentrate in a "field of study."

These changes directly affected the Department of Law. In 1989 the core course in law was reduced to 40 lessons in a single semester to allow cadets the opportunity to take an additional elective course.[139] Despite its curtailment, the core course retained a value of 3.5 credit hours instead of the normal 3.0 by virtue of 70-minute class periods (versus the normal 55 minutes). That is how the core course in Constitutional and Military Law is structured today, with essentially two-thirds of the course related to Constitutional Law, including how constitutional rights and authorities may be different in the military context. The remaining third of the course is devoted to criminal law and military justice, with a continuing emphasis

on the role of the officer and commander in a constitutional system based on the rule of law.

The Academic Board's decision to establish a component of the curriculum devoted to disciplinary concentration significantly influenced the law program at West Point. At the same time the core course was shortened to one semester, the Department of Law shifted gears and decided to begin offering the electives necessary to support a 10-course field of study in the American Legal System. Col. Dennis R. Hunt,[140] who succeeded Colonel Berry as Professor and Department Head in 1987, oversaw creation of the new approach, including a cohesive elective program. In addition to electives in Business Law, Environmental Law, Constitutional Law, and International Law that had previously been offered, new or revised courses included a National Security Law Seminar, Jurisprudence, Introduction to the Legal Method, Special Topics in the Law, and Development of Military Law.

Just prior to Colonel Hunt's retirement in 1998, the Law Department took the next logical step by developing a 12-course academic major in the American Legal System. Up to then, Law had been the only department not to offer a major; upon receiving the Academic Board's approval in 1999, Law joined every other department in offering both a field of study and a major.[141] The principle difference between the American Legal System field of study and the major, besides the two extra electives, is the requirement for majors to write a 30-page thesis on a narrow legal topic as part of a one-semester project. Cadets must conduct in-depth research and study to complete the thesis, and they must orally defend their work upon completion. Beginning with the Class of 2005, the thesis project will extend over both semesters of the First Class year.

For a number of years, part of what was dropped from the core course to fit it into one semester was made up as part of military science instruction during the two week period in January known as the Military Intersession. In conjunction with the Department of Military Instruction, the Department of Law taught First Class cadets some of the practical aspects of military law essential for company grade officers to know. The topics included such areas as nonjudicial punishment, administrative separations, reports of survey and other administrative actions, and law of war and rules of engagement.[142] Because the requirement to teach approximately 1,000 cadets in a two week period was beyond the capability of the assigned law

faculty, the department relied on Army Reserve attorneys to assist in teaching Intersession subjects.

In 2002 the Superintendent, Lt. Gen. William J. Lennox, decided to eliminate the intersession and return all military science instruction to the academic year. The department therefore reincorporated some of the legal topics covered during the intersession, particularly those related to military justice and administrative actions, into the last third of the core course. Additionally, it assisted the Department of Military Science in designing lesson plans and teaching subjects related to the law of war and rules of engagement as part of the military science instruction for First and Second Classmen.

Even so, reductions in the core course in law and periodic decreases in the amount of time allocated to the Department of Law during the intersession created a significant gap. Cadets were not receiving adequate instruction in the Law of War (particularly the basic rules of the Geneva and Hague Conventions), or any appreciation for Operational Law, increasingly important because of frequent Army deployments. The department coordinated with the Department of Military Instruction and the Commandant to incorporate law-of-war instruction and law-related scenarios into the summer field training exercises for Third Classmen at Camp Buckner. The revised training program took effect for Operation Highland Warrior, the cadets' culminating field training exercise, in the summer of 2000.

Responding to Congressional direction, in the early 1990s the Military Academy began supplementing the military faculty with limited numbers of civilian professors. In 1992, Prof. Edward Hume became the first civilian faculty member to join the Department of Law.[143] When the department gained another position four years later, Prof. Gary Solis, a retired U.S. Marine Corps lieutenant colonel who had earned a Ph.D. in the Law of War at the London School of Economics, came aboard.[144] Professor Solis completely revamped the course in Development of Military Law to create a new elective, Law of War for Commanders, that became an essential part of the American Legal System program.

The Academic Board's approval of the American Legal System major in 1999 enabled cadets in the program to be eligible for recognition at the Superintendent's Award Convocation, held during graduation week. Through the generosity of Col. Ron Salvatore, U.S. Army ret., a former Law faculty member and current Academy Counsel, the Maj. Gen. John D.

Altenburg, Jr., Award was initiated with the Class of 2001 to recognize the graduating cadet who had the best academic record while majoring in the American Legal System.[145]

As an adjunct to the classroom component of the American Legal System major, the Law Department developed an extensive intern program. The internships take place in the summer for up to three weeks; the fact that cadets often forgo their leave to take part in them suggests the quality and value of these experiences. In recent years cadets interns have served at the United States Supreme Court, the Department of Justice, the Office of the Army General Counsel, Staff Judge Advocate Offices throughout the Army, and the Office of The Judge Advocate General.[146] In the summer of 2002, additional internships became available at district attorney offices around the country, as well as at the American Embassy in Rome. An internship at the International Criminal Tribunal for the Former Yugoslavia was added in the summer of 2003.[147]

The department has also embarked on several long-term initiatives designed to enrich the academic major in law. It has expanded its relations with other military academies, particularly in areas related to International Law and the Law of War. At the instigation of Professor Solis, the Law of War for Commanders elective conducted Law of Armed Combat written exercises, initially with cadets from the Air Force Academy. The exercises quickly expanded to include the Naval Academy, the Coast Guard Academy, and the Royal Military College (RMC) of Canada. These exercises were the impetus for the first-ever service academy competition in the Law of Armed Conflict, conducted in March 2002 at the International Institute for Humanitarian Law in San Remo, Italy.[148] Six West Point cadets, all majoring in the American Legal System, participated, along with representatives of all other U.S. service academies, RMC, and cadets from military academies in Russia, China, Ireland, Greece, and Belgium.[149]

Members of the department were also instrumental in establishing the Consortium for Undergraduate Law and Justice Programs. In 2002 at Amherst College, representatives of the Department of Law met with faculty members from other schools having undergraduate legal programs. The group decided to create a formal non-profit consortium, which was founded in 2003. Moreover, they agreed that membership would be open to academic institutions instead of individuals, and that consortium meet-

ings would occur annually. In April 2004, the Department of Law hosted the first consortium conference, with the theme of Law and Terrorism.

The composition of the law faculty has continued to change in ways that only help strengthen the department. The current authorized strength of the law faculty is 16, including four civilian professors, one of whom is a visiting professor.[150] Five members of the faculty are rotating JAG Corps officers who typically serve a three-year tour primarily teaching the core law course. Another quarter of the faculty consists of rotating JAG Corps officers who report to the department after earning a Master of Laws (LL.M.) degree (this in addition to the earlier basic law degree qualifying them for commissioning in the JAG Corps) in one of four disciplines: Constitutional Law, Government Contract Law, International Law, or Environmental Law.[151] These faculty members use their expertise in these areas to manage the associated elective courses offered by the Department of Law. Additionally, they and the other rotating military faculty bring to the classroom their expertise from the practice of law in the field.

Prior to 2001 (except for the period 1969-1983), the Law Department was the only academic department with no permanent military faculty members other than the Department Head. In contrast, no other department had fewer than five permanent military professors. Without additional permanent faculty, the Department of Law would lack continuity in important areas—in particular, curriculum development, course design, resource allocation, and Academy governance. The Judge Advocate General of the Army, Maj. Gen. Walter B. Huffman, recognizing this state of affairs as a disadvantageous aberration, therefore approved the conversion of two JAG Corps positions in the department to Academy Professor positions, beginning in the summer of 2001.[152] After a hiatus of 18 years, the Department once again had the undeniable benefit of permanent military faculty. Academy Professors in the Law Department continue to be members of the JAG Corps, but they will remain permanently assigned to the law faculty until retirement.

Although the Department of Law is unique in several ways, it has evolved in parallel with the development of the academic program at West Point. Despite the many organizational and curricular changes, however, the purpose for law instruction has remained constant. When the department was created more than 125 years ago, the *Army and Navy Journal* noted that the study of law and the Constitution was of primary importance for any commissioned officer.[153] The Department of Law exists to educate future officers about their Constitutional rights and duties, including protection of the rights of all citizens, and to familiarize cadets with the mili-

tary justice system and the criminal law process. The Constitution requires commissioned officers to swear an oath to support and defend its principles. Those officers must understand the meaning of that oath, their essential role in protecting the liberty of all citizens, and their duty to uphold and enforce the law in a society and country based on the rule of law. For more than 200 years the Military Academy has accomplished this mission, and the Department of Law has played a major role in that success.

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† Professor and Department Head, Department of Law, United States Military Academy, West Point, New York.

[1] General Sheridan's response to the Toast to the Army made at the Constitution Centennial Celebration in Philadelphia, PA, in September 1887. At the time, General Sheridan, USMA Class of 1853, was Commander in Chief of the Army.

[2] Regulations of the United States Military Academy, 10 July 1816.

[3] Act of April 1, 1818, ch. 61, 3 Stat. 426.

[4] Keith L. Sellen, "The United States Military Academy Law Department—Yesterday and Today: Purpose—Challenge—Reward," *Federal Bar News and Journal* 37 (May 1990): 231. See also George B. Davis, "The Department of Law," in *The Centennial of the United States Military Academy at West Point, New York, 1802-1902*, Volume I (New York: Greenwood Publishers, 1902), 367.

[5] Monsieur de Vattel, *The Law of Nations; or Principles of the Law of Nature applied to the Conduct and Affairs of Nations and Sovereigns*, 4th American Edition (Philadelphia: Nicklind and Johnson, 1823), reprinted from London edition of 1797.

[6] Charles W. West, "Department of Law, U.S.M.A," *Assembly* XII (April 1953): 3.

[7] Department of Law Information Pamphlet (1987), 1.

[8] Sellen, "Law Department," 231.

[9] Ibid.

[10] Information Pamphlet, 1.

[11] Preliminary Inventory of the Records of the U.S. Military Academy, prepared by the Academy Archives in 1976, 21. See also Frederick C. Lough, "The Centennial of the USMA Department of Law," *Assembly* XXXII (March 1974): 8.

[12] William Rawle, *A View of the Constitution of the United States of America* (Philadelphia: Carey and Lea, 1825).

[13] *The Howitzer*, Class of 1928, 46.

[14] Ibid.

[15] Richard O'Connor, *Thomas, Rock of Chickamauga* (New York: Prentice-Hall, Inc, 1948), 66; Wilbur Thomas, *General George H. Thomas* (New York: Exposition Press, 1964), 63. See also Douglas S. Freeman, *R.E. Lee: A Biography* (New York: Scribner's Sons, 1943), I, 78-79. Although Jefferson Davis graduated from West Point a year before Lee, he stated that he did not use the Rawle text but was taught using Kent's *Commentaries*. Freeman, *R.E. Lee*, 78-79. For a further discussion of this issue, see John W. Brinsfield, "The Military Ethics of General William T. Sherman: A Reassessment." *Parameters: Journal of the U.S. Army War College* XII, no. 2 (June, 1982): 38. In contrast to Lee and others, Gen.William Tecumseh Sherman, an 1840 USMA graduate, whose favorite textbook in the Chaplain's course was Kent's *Commentaries*, left his position as Superintendent of the Lou-

isiana State Seminary and Military Academy to return to the Union Army when the Civil War started. Sherman stated that he would fight for the Union "as long as a fragment" of the "Old Constitution" remained. Ibid., 39-40.

[16] James Kent, *Commentaries on American Law* (New York: G. Halstead, 1826).

[17] Davis, "Department of Law," 367-68.

[18] Kent, *Commentaries*, 353-54.

[19] *The Army Lawyer: A History of The Judge Advocate General's Corps, 1775-1975* (Washington, DC: U.S. Government Printing Office, [1976], 27.

[20] Ibid., 35.

[21] Ibid.

[22] By Act of 4 July 1862, Congress created the foundation for the Judge Advocate General's Corps. Ibid. at 49-50. By Act of 2 March 1829, Congress re-authorized appointment of a Judge Advocate of the Army. Ibid. at 42.

[23] Lough, "Centennial," 8; Information Pamphlet, 1-2.

[24] Davis, "Department of Law," 368-69. The main objection to geography, history, and ethics was that they competed with the supposedly more important courses in mathematics, science, and engineering. Law instruction remained in the curriculum because of its relevancy to the missions that cadets would perform upon graduation. The experiences of graduates during the Civil War and during Reconstruction dramatized the need for a thorough grounding in constitutional law and the military justice system. Much of the information in this note was provided by Dr. Stephen Grove, USMA Historian.

[25] Lough, "Centennial," 8.

[26] Ibid. Known as the Lieber Code, this first codification of the rules and laws of war served as the basis for much of the developing law of war. Variations of the Lieber Code were adopted in several European countries and many of its provisions were later incorporated into the Geneva and Hague Conventions.

[27] *The Howitzer* (1928), 46. General Sherman, who had enjoyed his courses on law and ethics at West Point, believed in the utility of knowing the law as an Army officer. In fact, he studied the law intermittently from 1839 to 1859 and eventually became a practicing attorney. Brinsfield, "Ethics of General Sherman," 37-38. Many Southerners might doubt Sherman's adherence to legal principles based on his Civil War campaigns in the South. Chaplain Brinsfield's article explains how Sherman attempted to reconcile his belief in the law with the death and destruction of war. Sherman's interest in the law continued after the Civil War. The curriculum at Fort Leavenworth's School of Application included law at his personal direction. Robert W. Berry, "The Department of Law, USMA," *Assembly* XLIII (December 1984), 17.

[28] Act of June 6, 1874, ch. 217, 18 Stat. 60.

[29] *The Army Lawyer*, 72.

[30] Act of June 23, 1874, ch. 458, 18 Stat. 244. See also *The Army Lawyer*, 71-72; Sellen, "Law Department," 232.

[31] *The Army Lawyer*, 72.

[32] Sellen, "Law Department," 232.

[33] *Army and Navy Journal*, 4 July 1874, 745.

[34] Ibid.

[35] Sellen, "Law Department," 233; Preliminary Inventory of USMA Records, 21.

[36] Sellen, "Law Department," 233; Lough, "Centennial," 8.

[37] *The Army Lawyer*, 83.

[38] Ibid.

[39] Davis, "Department of Law," 369.

[40] Sellen, "Law Department," 233.

[41] John Norton Pomeroy, Introduction to the Constitutional Law of the United States (Boston: Houghton, Mifflin, 1886).
[42] Davis, "Department of Law," 369.
[43] *The Army Lawyer*, 77. See chap. 8 of the present volume [*West Point: Two Centuries and Beyond* (Lance Betros ed., 2004)] for a more detailed discussion of the Whittaker case.
[44] Ibid., 77-78.
[45] Sellen, "Law Department," 233.
[46] *The Army Lawyer*, 79.
[47] Sellen, "Law Department," 233.
[48] *The Army Lawyer*, 85.
[49] Ibid.; Lough, "Centennial," 8.
[50] Sellen, "Law Department," 233.
[51] Rollin A. Ives, *A Treatise on Military Law* (New York: D. Van Nostrand, 1879).
[52] Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* (Boston: Little, Brown, 1880).
[53] Davis, "Department of Law," 369.
[54] *The Army Lawyer*, 86.
[55] Ibid.
[56] Ibid.
[57] Ibid., 96-97.
[58] William Winthrop, *Military Law* (Washington, DC: W. H. Morrison, 1886).
[59] Ibid., 98.
[60] Davis, "Department of Law," 370.
[61] *The Army Lawyer*, 99.
[62] Ibid. William Winthrop, *Military Law and Precedents* (Boston: Little, Brown, 1896).
[63] Ibid., 99-100.
[64] Ibid., 99; Lough, "Centennial," 9.
[65] *The Howitzer* (1928) , 46; Preliminary Inventory of USMA Records, 21.
[66] Ibid.
[67] Sellen, "Law Department," 233; *The Army Lawyer*, 101.
[68] Lough, "Centennial," 9.
[69] Ibid.; Sellen, "Law Department," 233.
[70] Lough, "Centennial," 9.
[71] George B. Davis, A Treatise on the Military Law of the United States: Together with the Practice and Procedure of Courts-Martial and other Military Tribunals (New York: J. Wiley & Sons, 1898); George B. Davis, The Elements of Law: An Introduction to the Study of the Constitutional and Military Law of the United States (New York: J. Wiley, 1904); George B. Davis, The Elements of International Law: With an Account of its Origin, Sources, and Historical Development (New York and London: Harper & Brothers, 1900). See also Sellen, "Law Department," 233; Davis, "Department of Law," 370.
[72] Sellen, "Law Department," 233. Colonel Davis wrote the International Law text the same year he graduated from law school. It was used as a text at West Point even before he was Professor of Law. Ibid., 238, n. 64.
[73] Ibid., 233-34.
[74] Lough, "Centennial," 9.
[75] Ibid. On Tuesdays and Thursdays, the cadets received two hours of history instruction from their law professors.
[76] *The Army Lawyer*, 102.
[77] Ibid.
[78] Sellen, "Law Department," 231.

[79] Lough, "Centennial," 9.
[80] Information Pamphlet, 3.
[81] Lough, "Centennial," 9.
[82] Sellen, "Law Department," 236.
[83] Ibid.
[84] Ibid., 236, 239, n.13.
[85] Ibid., 231 (quoting from the 1947 edition of *The Howitzer*).
[86] United States Military Academy Report of the Superintendent's Ad Hoc Committee on the Coverage of Law at the Military Academy (1963), Letter to the Committee from Lt. Gen. F. S. Besson, Jr., 67. At the time he wrote the letter, Besson commanded the Army Materiel Command.
[87] Report of Ad Hoc Committee, Letter from Maj. Gen. Andrew J. Goodpaster, 80. When he wrote the letter, Goodpaster was serving as Assistant to the Chairman of the Joint Chiefs of Staff. After retiring from the Army following his assignment as SACEUR, Gen. Goodpaster was recalled to active duty as Superintendent of the Military Academy in 1977.
[88] *The Howitzer*, Class of 1941, 53. "The Academic Board has come to realize that the study of Law has special training values particularly useful to military men—the development of powers of analysis and a sense of relative values. These developed faculties furnish an officer a sound basis for his 'Estimate of the situation,' so important in a successful military career."
[89] *The Howitzer*, Class of 1935, 43.
[90] West, "Department of Law," 5.
[91] Sellen, "Law Department," 232.
[92] Ibid.
[93] Information Pamphlet, 3.
[94] Berry, "The Department of Law," 18.
[95] Ibid. Another distinguished alumnus of the Department of Law is Lt. Gen. Paul Caraway, an infantry officer who taught law at USMA from 1938 to1942. Caraway, a 1929 USMA graduate, earned a law degree from Georgetown Law School while stationed in Washington, DC, but never served in The Judge Advocate General's Corps. He worked for Gen. George C. Marshall during World War II and participated in almost every significant postwar conference, including Yalta and Bretton Woods. Caraway later served as a special Vice Presidential aide to Richard Nixon and culminated his military career as Commanding General and High Commissioner of the Ryukyu Islands.
[96] Lough, "Centennial," 9.
[97] *The Army Lawyer*, 139.
[98] Lough, "Centennial," 9.
[99] *The Army Lawyer*, 149.
[100] West, "Department of Law," 4.
[101] Ibid.
[102] Ibid.; Information Pamphlet, 4.
[103] Congress enacted legislation establishing permanent professors of the Military Academy. *U.S. Code*, Vol. 10, section 4336 (1956). Once selected and approved, the officer becomes a Professor, United States Military Academy, (PUSMA) which is its own military branch, the smallest in the Army. This statutory position is a separate category from Academy Professors, who remain in their basic branch but are assigned to the faculty until they retire.
[104] As an exception to other statutes governing retirement based on age or years of service, *U.S. Code*, Vol. 10 section 1251 (1980) permits a permanent professor of the Military Academy to retire "on the first day of the month following the month in which he becomes 64

years of age." *U.S. Code*, Vol. 10, section 3962 (1956) permits retirement as a brigadier general, at the discretion of the President. The Secretary of the Army may, at his discretion, retire any permanent professor who has more than 30 years commissioned service. *U.S. Code*, Vol. 10, section 3920 (1956).

[105] Information Pamphlet, 4.

[106] Ibid.

[107] Sellen, "Law Department," 232.

[108] Information Pamphlet, 3-4.

[109] West, "Department of Law," 4.

[110] Ibid., 3.

[111] Report of Ad Hoc Committee, 1-3.

[112] Report of Ad Hoc Committee, 39-40.

[113] Ibid., 40.

[114] Ibid., 34.

[115] Ibid., 71 (Letter from Maj. Gen. Charles L. Decker).

[116] Ibid., 73.

[117] See note 87 above and accompanying text.

[118] Report of Ad Hoc Committee, 80 (Letter from Major General Goodpaster). Goodpaster's West Point classmate, Col. Julian J. Ewell, serving as Executive to the Chairman, Joint Chiefs of Staff, wrote "A well educated man, particularly in public service, must understand the part that the law plays in both civil and military pursuits. There is also an aspect of the law which is even more intangible. This is the philosophical, historical, and cultural understanding which the regular officer, the professional soldier, and the temporary citizen soldier should bring to their role as a citizen in our democracy. I have in mind here the duties of each citizen as a voter, a taxpayer, a soldier." Ibid., 58 (Letter from Col. Julian J. Ewell). Ewell later commanded the 9th Infantry Division in Viet Nam, served as Military Representative to the Viet Nam Peace Talks Delegation in France, and retired from the Army as a lieutenant general.

[119] Lough, "Centennial," 8.

[120] Ibid., 9.

[121] Ibid.

[122] Department of Law Historical Files and Personnel Records. The first officer selected was [then] Lt. Col. Thomas Oldham, who served from 1969 to 1975. The second Permanent Associate Professor, as they were then designated, was [then] Maj. Daniel Shimek, who began in that position in 1974. When Col. Oldham retired in 1975, he was replaced by [then] Lt. Col. Hugh Henson.

[123] Colonel Berry, a Harvard Law School graduate, served as an enlisted soldier during World War II and as an officer in the Korean War, prior to completing law school. Although he did not serve on active duty in the JAG Corps before selection as Professor of Law, he had a long prior association with the Military Academy and served as the General Counsel of the Army from 1971 to 1974.

[124] Memorandum of Maj. Gen. Hugh J. Clausen, The Judge Advocate General, for the Deputy Chief of Staff for Personnel, US Army (10 February 1982), Subject: Permanent Associate Professors of Law at USMA. Although the precise reasons for eliminating these positions is not clear from the historical record, Colonel Berry did not believe (and still does not) that permanent military faculty positions were good for the Department of Law. In addition, he and Colonel Henson had differing views of how the department should operate. That conflict was almost certainly exacerbated by the fact that Colonel Henson, the senior Permanent Associate Professor who served as Acting Head of the Department for the year preceding Colonel Berry's arrival, also contended for the Professor of Law position for

which Berry was selected. The Judge Advocate General, Major General Clausen, did not approve of some actions that the other Permanent Associate Professor, Lieutenant Colonel Shimek, had taken while serving as the Staff Judge Advocate for USMA during a period when the Department of Law was responsible for both teaching and rendering legal advice to the USMA leadership. Exercising his statutory authority over assignments of all officers in the JAG Corps, Clausen reassigned Henson and Shimek.

[125] Sellen, "Department of Law," 232.

[126] Ibid.; Law Records.

[127] Information Pamphlet, 5.

[128] The cheating scandal, the most widespread in Academy history, resulted in a comprehensive review of many of the policies and procedures at West Point. The Secretary of the Army asked Col. (retired) Frank Borman to head the review commission because of his reputation for integrity, clear thinking, and common sense.

[129] Information Pamphlet, 5.

[130] Ibid.

[131] Berry, "The Department of Law," 17.

[132] The Military Justice Act of 1968 and the 1969 *Manual for Courts-Martial* essentially removed line officers from court-martial roles other than as court members or witnesses. Henceforth the prosecution and defense functions were assigned to members of the bar; moreover only qualified attorneys could be military judges. This revision was part of a continuing effort to make courts-martial fairer for accused soldiers and to more closely align the military justice system with the federal criminal court system.

[133] Sellen, "Department of Law," 236.

[134] Berry, "The Department of Law," 17.

[135] Memorandum of Colonel Dennis R. Hunt to Curriculum Reduction Study Committee (1 May 1989), 1.

[136] Ibid.

[137] Berry, "The Department of Law," 17.

[138] Col. (ret) Daniel Shimek, interview by author, 5 February 2004.

[139] Colonel Hunt memorandum, 1-2; Law Records.

[140] Colonel Hunt, a Harvard Law School graduate, had served as the Chair of the Criminal Law Department, The Judge Advocate General's School, and as Staff Judge Advocate, 24th Infantry Division, Fort Stewart, GA, prior to his selection as Professor of Law. He retired as a brigadier general in 1998 and currently teaches law at the University of Southern Mississippi.

[141] Because she was able to adjust her schedule to meet the additional requirements for a major, Cadet Erin Scheu, Class of 2000, became the first graduate to major in the American Legal System.

[142] *Tools of the Profession: The Leader's Legal Role*, Department of Law Reference Book New York: McGraw-Hill [2001]).

[143] Department of Law Records.

[144] Professor Solis brought favorable notice to the department throughout his five years at West Point and was a frequent national commentator on law of war and military law issues. He devised a new elective on Law of War for Commanders that has become an essential part of the American Legal System program. He received his law degree from The University of California-Davis and served two tours in Viet Nam as a Marine platoon leader and company commander. His book *Son Thang:* An American *War Crime*, is an excellent study of the application of the law of war and the operation of the military justice system during wartime. It is now a required supplemental text for cadets who major in the American Legal System. When Solis departed in 2001, Lt. Col. (ret.) Mark Welton, who had just

completed his second teaching assignment in the department, was hired as a civilian to replace him. In addition to a law degree from Georgetown University and two master's degrees, Professor Welton has earned both an LLM and a Doctor of Juridical Science (S.J.D.) degree from the University of Virginia School of Law. While on active duty, in addition to teaching assignments at West Point and the International Law Department of the Judge Advocate General's School, he served as Chief of International Law for US Army, Europe, and as Deputy Staff Judge Advocate, US European Command. Professor Welton not only has a wealth of experience in International Law, he is also one of the United States' leading experts on Islamic law. Two additional civilian faculty members, hired in the summer of 2000 (Prof. Tim Bakken) and the summer of 2001 (Prof. Margaret Stock) also brought specialized expertise, particularly important as the department increased the depth and breadth of law instruction for an expanding number of cadets who major in the American Legal System.

[145] Major General Altenburg culminated a distinguished military career that included service in Viet Nam and the Gulf War with a four-year assignment as The Assistant Judge Advocate General, from 1997 to 2001. Throughout his career, he was a strong supporter of teaching law and of the Department of Law. He has a son and daughter who are both members of the West Point Class of 1995.

[14] Department of Law Pamphlet, "American Legal System Academic Individual Advanced Development Program, Summer 2002."

[147] Ibid.

[148] The San Remo Institute is a world renowned organization that teaches law of war, international law, and humanitarian law courses to military officers and other interested individuals from around the world.

[149] Patrick Murphy, "West Point Cadets Receive Top Honors," *Pointer View* 59 (12 April 2002): 1. The competition has continued annually, with the Department of Law providing cadet teams and instructors each year.

[150] The number of faculty is the smallest of any academic department by an order of magnitude—the next smallest department is twice the size. All military members of the Law Department are in the same branch of the Army—the Judge Advocate General's Corps—while cross sections of all other branches are represented in the other departments.

[151] The Academic Board approved significant changes to the curriculum beginning with the Class of 2005. As a result, the Department of Law will offer a new elective in Comparative Law, particularly useful as the Army deploys to many areas of the world. To assist in devising and teaching that course, one of the LL.M.s for faculty positions was shifted from Environmental Law to Comparative Law, effective the summer of 2003. The first faculty member to specialize in that subject will complete his LL.M. at the London campus of the University of Notre Dame Law School in the summer of 2004.

[152] Memorandum of Maj. Gen. Walter B. Huffman to Professor and Head, Department of Law, Subject: Academy Professors, Department of Law, USMA, dated 24 October 2000. After the application and selection process, the Academic Board approved the nominations of Lt. Col. Maritza Ryan (USMA Class of 1982) and Lt. Col. David Wallace as the first Academy Professors in the Department of Law.

[153] See notes 33-34 above and accompanying text.

SEVENTEENTH WALDEMAR A. SOLF LECTURE IN INTERNATIONAL LAW[1]

PROFESSOR MICHAEL J. GLENNON[2]

Thank you so much for that very kind and generous introduction. General Black, General Rikhye, Lieutenant Colonel Wollschlaeger, and honored guests, it is a terrific pleasure to be here today to give this famous lecture and to visit this most impressive institution.

I am especially honored to have a chance to talk to those of you who make a difference in the first instance in the life and death of the rule of law. As an academic, I often talk to students about the need for internalizing the theoretical framework of the law. I think all of us who have been in the world of practice know that [the theoretical framework] only really

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1. This is an edited transcript of a lecture delivered on 3 March 2004, by Professor Michael J. Glennon to the members of the staff and faculty, distinguished guests, and officers attending the 52d Graduate Course at The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia. The Judge Advocate General's School, U.S. Army, established the Waldemar A. Solf Chair of International Law on 8 October 1982. The chair is named in honor of Colonel (COL) Waldemar A. Solf (1913-1987). Colonel Solf, commissioned in the Field Artillery in 1941. He became a member of the Judge Advocate General's Corps in 1946. Colonel Solf's career highlights include assignments as the Senior Military Judge in Korea and at installations in the United States; the Staff Judge Advocate of the Eighth U.S. Army and United States Forces Korea, the United Nations Command, and the United States Strategic Command. He also served as the Chief Judicial Officer, U.S. Army Judiciary, and as the Chief, Military Justice Division, Office of The Judge Advocate General (OTJAG).

After two years lecturing with American University, COL Solf rejoined the Corps in 1970 as a civilian employee. Over the next ten years, he served as Chief of the International Law Team in the International Affairs Division, OTJAG, and later as chief of that division. He was a representative of the United States to all four of the diplomatic conferences that prepared the 1977 Protocols Additional to the 1949 Geneva Conventions. After his successful efforts in completing the Protocol negotiations, he returned to Washington and was appointed the Special Assistant to The Judge Advocate General for Law of War Matters. Having been instrumental in promoting law of war programs throughout the Department of Defense, COL Solf again retired in August 1979.

In addition to teaching at American University, COL Solf wrote numerous scholarly articles. He also served as a director of several international law societies, and was active in the International Law Section of the American Bar Association and the Federal Bar Association.

matters where the law is actually applied, where the law lives or dies. So, I'm especially honored to have a chance to be with you here today.

I want to talk to you about an experiment, about the greatest legalist experiment of the 20th century: humanity's effort to subject the use of force to the rule of law. I want specifically to discuss the failure of that experiment. I'm going to do that by addressing, first, the nature of the problem, which can be succinctly stated; second, the solution that humanity settled upon to resolve that problem; third, the failure of that solution; fourth, the reasons for that failure; and finally, where we go from here—specifically, what the United Nations (UN) and the United States can do about it.

First, the problem. For the better part of human history, the fate of states was determined by geopolitics, by geography and economics, by diplomacy and trade, and not least by relative military might. The interplay of those forces produced anarchy and often, massive brutality. War was fought frequently and pitilessly. Cities were burnt. Farmland was laid waste. Populations were exterminated and survivors were enslaved. Finally with the deaths of forty-seven million people in World War I, humanity turned its back, or thought it turned its back, on the reigning geo-

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2. Professor of International Law at the Fletcher School of Law and Diplomacy, Tufts University, Medford, Massachusetts. Professor Glennon previously has taught at the University of California, Davis, Law School, and the University of Cincinnati College of Law. Before teaching, he was Legal Counsel to the Senate Foreign Relations Committee (1977-1980) and Assistant Counsel in the Office of the Legislative Counsel of the United States Senate (1973-1977). From 1980 to 1981, he was in private law practice in Washington, DC. In 1998 he taught international and constitutional law in Lithuania on a Fulbright fellowship. During the 2001-2002 academic year, Professor Glennon was a Fellow at the Woodrow Wilson International Center for Scholars in Washington, DC. He is the recipient of the Deak Prize and Certificate of Merit from the American Society of International Law. From 1986 to 1999, he was a member of the Board of Editors of the *American Journal of International Law*. He is a member of the American Law Institute and the Council on Foreign Relations.

He served as a consultant to various departments and agencies of the federal government, congressional committees, foreign governments, and the International Atomic Energy Agency. He has testified before the International Court of Justice and various congressional committees. A frequent commentator on public affairs, he has spoken widely within the United States and overseas and appeared on *Nightline*, *The Today Show*, NPR's *All Things Considered*, and other national news programs. His op-ed pieces have appeared in the *New York Times*, *Washington Post*, *Los Angeles Times*, *International Herald-Tribune*, *Financial Times*, and the *Frankfurter Allgemeine Zeitung*. Professor Glennon is the author of numerous articles on constitutional and international law and a number of books on the same subject areas.

political balance of power system, and substituted what it thought was a new legalistic order to constrain the exercise of state power. This new order was embodied, as we all know, in the Covenant of the League of Nations.[3] "The tents have been struck," said South African Prime Minister Jan Christian Smuts, "and the great caravan of humanity is once more on the march."[4] Smuts said that at the framing of the Covenant of the League of Nations treaty at the Versailles Peace Conference in 1919.[5] The Covenant regime was embellished eight years later by the famous, or infamous, Kellogg-Briand Pact by which states promised to forego war as an instrument of national policy.[6] For the first time, the use of force by one state against another was declared by the international community to be unlawful.

Well, as we all know, it didn't work. Millions more people were killed in World War II. In San Francisco in 1945, representatives of the community of nations met once again to ensure that [war] never happened again — "to save succeeding generations from the scourge of war"—in the famous words of the UN Charter.[7] The solution that was arrived at in San Francisco is familiar, but I think it may be worth taking a moment to review. The framework is set out in Chapter VII of the UN Charter.[8] The point of Chapter VII was to give the UN Security Council a monopoly on the use of force. The idea was to set up a system in which the use of force would be permissible in only two circumstances: one, if it was authorized by the UN Security Council in response to a threat to the peace, breach of the peace, or act of aggression; and second, under Article 51 of the Charter, for self-defense, in the event of an armed attack upon a member state.[9]

These are the only two circumstances in the UN Charter in which use of force is permitted. The idea was that this strict limitation on the right of states to use force for self-help made sense because the Security Council would be, as Winston Churchill put it, a constabulary force before which the forces of atavism and barbarism would stand in awe.[10] It would be a

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3. Covenant of the League of Nations, *reprinted in* BENJAMIN B. FERENCA, 1 DEFINING INTERNATIONAL AGGRESSION: THE SEARCH FOR WORLD PEACE (1975).

4. Lieutenant-General Jan Christian Smuts, The League of Nations: A Practical Suggestion, *reprinted in* 2 THE DRAFTING OF THE COVENANT 23, 60 (David Hunter Miller ed., 1928).

5. Treaty of Versailles, June 28, 1919.

6. Aug. 27, 1928, 46 Stat. 2343, T.S. No 796, 94 L.N.T.S. 57.

7. U.N. CHARTER pmbl.

8. U.N. CHARTER ch. VII.

9. *Id.* art. 51.

constabulary force because the Security Council would enter into special agreements with member states under Article 43 of the Charter,[11] states that would agree to provide it with naval and sea and land units to serve in a standing or stand-by force, which would respond decisively when states reported to the Security Council (as they were required to do) when they were attacked.

Well, that's the way the system was intended to work. Of course, as we all know, it didn't quite turn out that way. The Security Council, paralyzed by the threat of the Soviet veto during the Cold War, never initiated the negotiation of special agreements with member states. No standing or stand-by force was ever set up under the military staff committee of the Security Council. In the fullness of time, states once more began to use force for purposes of self-help. By the 1990s, well over 200 instances could be cited in which states had used armed force in clear violation of the prohibition in Article 2, paragraph 4 of the UN Charter against any use or threat of force against the territorial integrity or political independence of any state.

Most recently, in the 1990s, we saw nine African states involved in what Madeleine Albright[12] referred to as Africa's "First World War,"[13] a vast interstate conflict that cost tens of thousands of lives. All this was in a sense capped by NATO's use of force against Yugoslavia; a war in which nineteen western democracies representing 780 million people—the founders and charter members of the UN—used force without any authorization of the UN Security Council, and without any plausible claim to act in self-defense. I won't review the controversy about whether the United States acted pursuant to Security Council authorization in the recent con-

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10. *See* WINSTON S. CHURCHILL: HIS COMPLETE SPEECHES 1897-1963 5998 (Robert Rhodes James, ed., 1974). In a speech at Bristol University on 2 July 1938, referring to the League of Nations, Sir Winston Churchill stated, "Civilization will not last, freedom will not survive, peace will not be kept, unless a very large majority of mankind unite together to defend them and show themselves possessed of a constabulary power before which barbaric and atavistic forces will stand in awe." *Id.*

11. U.N. CHARTER art. 43.

12. Ms. Madeleine Albright served as the U.S. Secretary of State for President William Jefferson Clinton from 1997-2001.

13. Mike Crawley, *Kabila and Africa's 'First World War,'* CHRISTIAN SCI. MONITOR, Jan. 18, 2001, at 1 (quoting Secretary Albright describing the Congo as at the heart of Africa's "first world war").

flict in Iraq. Suffice it to say, that is not a view that is shared unanimously by the international community.

The short of it is, therefore, the system that was set up by the UN Charter once again has proved ineffective. Now, as a matter of law, one can parse this failure in different ways; I won't get into the various technical legal doctrines—desuetude, non-liquet, the freedom principle of the *Lotus* case,[14] etc.—that might be pertinent to a situation such as this. Suffice it to recall the fundamental precept of the international legal order, which is that that legal order is volunteerist. States are bound only by those rules to which they consent, and the question is in each case whether the state in question has consented to the rule with which it supposedly is compelled to comply.

The question, to put it slightly differently, is this: viewing all the state's words, all the state's deeds, all the indicia of a state's intent, does that state intend to be bound with the rule in question? Yes, it is useful to start with the language of the UN Charter. It is not, however, useful to stop there. Subsequent practice—those 200-some incidents that I've talked about—have probative effect under a legal methodology that is directed, once again, at assessing all indicia of the state's consent to decide what rules the state in fact accepts.

It is sometimes said that states have not explicitly renounced their obligations under the UN Charter. But the question, once again, is whether states have actually posited a rule that says they must explicitly renounce prior obligations before acting in a manner inconsistent with those obligations. Where did the United States ever undertake such an obligation of explicit renunciation? It is said that the United States, by its conduct, in "going back" to the Security Council to seek authorization to attack Iraq, has demonstrated that it accepts the regime of the UN Charter, and that that demonstrates the continuing relevance of the UN.[15] To that I can only say that if this is the test—if the reference point is "justificatory discourse" as some academics like to describe it[16]—if this is the test, then the League of Nations passed with flying colors. In 1936, the debate over the Italian invasion of Abyssinia occurred in the Council of the League of Nations in Geneva.[17] Similarly, if the test is whether reference to the putative regime for justification indicates acceptance of that regime, recall that Adolf Hitler, upon invading Poland in 1939, justified the invasion as permissible under international law because Germany claimed to have been "attacked"

14. S.S. Lotus (Fr. v. Turk.) 1927 P.C.I.J. (ser. A) No. 10, at 4.

by Poland. I for one do not take great comfort in these supposed indicia of intent.

The appropriate conclusion, it seems to me, is an unfortunate one. It is a conclusion that I lament. But the conclusion is that the regime governing the use of force, that has been established by the UN Charter, has collapsed. I suggest that anyone who doubts that look at the words of the United States' representatives to the UN, and indeed, our chief executive's words. Yes, it is true. Again, there may have been no explicit renunciation, but who seriously would suggest that the claimed right to use preemptive force made in the national security strategy statement can be squared with the explicit requirement of an armed attack set out as a predicate in Article 51 for the defensive of use of force? Secretary [of State Colin] Powell[18] said on 27 January 2003, "We continue to reserve our sovereign right to take military action against Iraq alone or in a coalition of the willing."[19] Our sovereign right? I thought that right was limited under the UN Charter. Is this statement really consistent with the recognition that that sovereign right is limited by Article 51 of the Charter? President [George W.] Bush said in his 2003 State of the Union address, "The course of this nation does not depend on the decisions of others."[20] But of course, if one accepts the regime of the UN Charter, the course of this nation in a situation such as Iraq depends very much upon the decisions made by the UN

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15. *See, e.g.*, Simon Chesterman, *To Be Irrelevant or to Go Along; Dilemma for Europe*, INT'L HERALD TRIB., Feb. 7, 2003, at 8 (analyzing the best course for "Old Europe" Security Council members regarding the U.S.-proposed ouster of Saddam Hussein's regime); John Donnelly, *Bush, Blair Display Unity on Iraq, Britain Signals Preference for Wider Coalition*, BOSTON GLOBE, Feb. 1, 2003, at A1 (quoting President Bush saying, "[s]hould the [UN] decide to pass a second resolution, it would be welcomed if it is yet another signal that we're intent upon disarming Saddam Hussein"); Philip Stephens, *Learning to Live in a World Governed by American Rules*, FIN. TIMES (London), Feb. 7, 2003, at 17 (questioning whether UN sanctioning of war in Iraq provides more than the mere appearance of UN authority); Editorial, *Irrefutable*, WASH. POST, Feb. 6, 2003, at A36 (describing U.S. Secretary of State Colin Powell's February 5, 2003, presentation to the United Nations as "a worthy last effort to engage the United Nations").

16. Claire R. Kelly, *Realist Theory and Real Constraints*, 44 VA. J. INT'L L. 545 (2004).

17. ALFRED ZIMMERN, THE LEAGUE OF NATIONS AND THE RULE OF LAW 1918-1935, at 103 (1936).

18. Colin Powell currently serves as the U.S. Secretary of State, appointed in January 2001 by President George W. Bush.

19. Nicholas Kralev, *Powell Ties Saddam Regime to al Qaeda; No 'excuse for inaction,'* WASH. TIMES, Jan. 27, 2003, at A1.

20. President George W. Bush, State of the Union Address (Jan. 28, 2003), *available at* http://www.c-span.org/executive/stateoftheunion.asp (last visited Oct. 27, 2004).

Security Council. In his 2004 State of the Union address, President Bush said, "America will never seek a permission slip to defend the security of our country."[21] Well, again, sometimes, absent an armed attack, it is necessary—under the regime of the United Nations Charter—to seek a "permission slip" because force can be used only with the authorization of the UN Security Council. So, it seems to me that like many other states, the United States does not in reality continue to accept the regime set out in 1945 in the UN Charter.

The failure of the [UN] regime is, I say once again, a tragedy. I lament it. But the United States is not alone in this regard, and my suggestion to you is quite simply that if the international community as a whole intended for the regime of the UN Charter to be binding, it would have set up a system in which the costs of noncompliance exceed the benefits, and it has not done that. So, that's the problem. That's the solution that has been attempted. And that is the fate of the solution. The solution has not worked.

Now, why has the attempted solution not worked? What are the causes of the failure of this solution? Why have rules that were once, in the words of the famous American legal realist Karl Llewellyn, working rules—why have those working rules changed gradually into paper rules?

There are, I believe, three reasons for the collapse of the international legal regime governing the use of force. First, and most important, is an absence of consensus on fundamental, underlying values. The reason that the term "aggression" is used but not defined in the Rome statute establishing the International Criminal Court is plain.[22] Notwithstanding numerous efforts over the last five decades by the international community to define the term, aggression remains a concept that has no settled definition. The extent of the divisions became evident with NATO's use of force against Yugoslavia in 1999. Russia and China were not the only states to take vigorous issue with the claim that NATO's action was permitted by international law. In April of the year 2000, 114 member states of the nonaligned movement condemned humanitarian intervention. It has no legal basis

21. *State of the Union Address*, WASH. POST, Jan. 21, 2004, at A18.

22. Rome Statute of the International Criminal Court. President Clinton signed the treaty on Dec. 31, 2000. As of 31 Aug. 2001, 139 states have signed the treaty, including every member of the European Union and most other major allies, such as Canada and Australia, and thirty-seven states have ratified the treaty. Status of ratification of the International Criminal Court Rome Treaty is *available at* http://www.un.org/law/icc/statute/status.htm (last visited Nov. 3, 2004).

under the Charter, they said. This gulf between nations of the North and the West, on the one hand, and those of the South and the East on the other, was reflected in states' reaction to Secretary General Kofi Annan's,[23] 20 September 1999 address to the General Assembly. He spoke of the need to "forge unity behind the principle that massive and systematic violations of human rights wherever they take place should never be allowed to stand."[24] This speech led to weeks of debate among UN members. Of the nations that spoke out in public, roughly a third appeared to favor humanitarian intervention under some circumstances. Another third opposed it across the board. And the remaining third were equivocal or non-committal.

The divisions, however, did not end with Kosovo. Before its attack on Iraq, the United States, as I mentioned a moment ago, claimed broad power to use preemptive force[25]—a claim contested by many other states including American allies. The attack on Iraq generated heated denunciations by many states.

A recent poll by the German Marshall Fund asked respondents in six European states and the United States whether the use of force is appropriate to advance justice.[26] In Europe, forty-eight percent of the respondents said yes. In the United States, eighty-four percent said yes.[27] The evidence, it seems to me, is incontrovertible on the most important of international values. On the question of when the use of force is appropriate, the international community is split down the middle. Working rules have become paper rules largely for that reason.

The consequence of this failure and fracture is to undermine severely the effectiveness of legal regulation of the use of force. To function prop-

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23. Kofi Annan currently serves as the Secretary General of the United Nations, taking office on 29 June 2001.

24. Richard Reeves, *A Tale of Two Speeches*, DENVER POST, Sept. 26, 1999, at K3.

25. *See, e.g.*, Craig Gilbert, *The Best Defense? Pre-emptive Attacks Are a New Option*, SEATTLE TIMES, Apr. 20, 2002, at A3 (questioning the United States' authority to use pre-emptive force against Iraq); Ann Scott Tyson, *Where Antiterror Doctrine Leads*, CHRISTIAN SCI. MONITOR, Feb. 7, 2002, at 1 (contending that Pres. Bush's preemptive strike policy was greater in scope than Israel's bombing of Iraq's Osirack reactor in 1981); Richard Wolffe, *The Bush Doctrine*, FIN. TIMES (London), June 21, 2002, at 18 (commenting on the international consequences of a change in United States foreign policy that includes pre-emptive strikes).

26. *See* Christopher Caldwell, *'Murky Pacificism' Is a Parody of the Old Virtue*, FIN. TIMES (London), Oct. 25, 2003, at 15.

27. *See id.*

erly, law requires a consensus on basic values concerning the subject matter of the regulation. When that consensus evaporates, working rules, as I say, become paper rules. As British Foreign Secretary Jack Straw put it, "If you have a set of rules which conflict with reality, then reality normally wins."[28] That, unfortunately, is precisely what has happened to the use of force rules embodied in the UN Charter. Those rules have fought a losing battle with geopolitical reality. I might say, to use a perhaps simplistic analogy, that the situation is rather similar to one in which a community is divided over the propriety of using fireworks. One half of the community wishes to permit fireworks at night but prohibit them during the day. The other half wants to permit them during the day but prohibit them at night. How is it possible for that community to come up with a working rule governing when fireworks can be used? Yes, it is possible to paper over the difference. The community can enact an ordinance saying, in effect, that it's impermissible to use fireworks when it's inappropriate—which is, in effect, what the UN Charter does in purporting to regulate the use of force—but is that really a triumph of the rule of law?

The second reason why the Charter has failed relates to disparities of power. Any legal system must be grounded on incentives that enhance the likelihood of compliance. One principal source of those incentives must be the underlying power structure. Yet, a configuration of power has emerged in the international community since the end of the Cold War—unipolarity—that provides a disincentive on the part of the hegemonic power to subject itself to legalist constraints governing the use of force. Because the United States is often capable of getting what it wants through the use of force rather than through support for restraints on the use of force, the United States has little incentive to subject itself to such restraints. To do so would, after all, largely eliminate the advantage of hegemony. So long as huge disparities of power separate the United States from other states, this dynamic will likely prevail.

Moreover, this dynamic is not one-sided. Second–tier power competitors, such as France, Russia, and China, have every incentive to try to reestablish a multipolar system. In doing so, such states have every incentive to use institutional tools at their command to advance their national interest and enhance their own power, as France and Germany have recently done in the European Union. They have objected to proposed changes to the European Constitution that have been suggested by third–tier powers such

28. George Parker, *EU Pact Dispute Blights Foreign Minister Meeting*, FIN. TIMES (London), Nov. 29, 2003, at 6.

as Poland and Spain, which have been directed at enhancing their own power.[29]

Hence the train wreck in the Security Council in 2002 when the veto threat was deployed to that same end. States use international institutions for the same reason that they join them: to enhance their own power, not that of power competitors. Of course, these sorts of disincentives are not necessarily determinative. Many other factors bear upon a state's decision to reject or accept given policies. But these incentives are extremely powerful, and under current conditions they do tend to undermine the proper functioning of the legalist order governing the use of force. The same incentives, as I'll mention in a moment, will inevitably limit the potential of any reform aimed at strengthening the legal order governing the use of force.

The third factor that is responsible for the collapse of this regime is a free rider phenomenon. The more a given state acts unilaterally to provide a public good such as collective security, the less incentive is provided for other states to do so. In practical terms, this means that the percentage of GDP [Gross Domestic Product] spent by the United States and European states on defense is not likely to change. It is unlikely that European states will give up their TGV's ,[30] early retirement systems, universal health care, and the like to provide the expenditures needed to participate meaningfully in the provision of collective security—provided the United States remains committed and willing to doing it itself.

The upshot is that the United States will continue to be caught in a dilemma: it will be locked in the situation in which it must act alone as the world's policeman or see no action, with no other nation or nations willing and able to do so. Either alternative bodes ill for the possibility of breathing life into Chapter VII of the UN Charter.

So, finally, where do we go from here?

First, let me begin with the UN and then turn to the United States. The three conditions that I have outlined severely limit the potential of a legalist regime to regulate the use of force. Because these conditions were not

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29. *See* John O'Doherty, *European Constitutional Fight Echoes America's*, BALT. SUN, Jan. 13, 2004, at 13A.

30. Train à Grande Vitesse, *at* http://www.brainyencyclopedia/encyclopedia/t/tg/tgv.html (last visited November 9, 2004) (defining the term TGV as Train à Grande Vitesse, the French high-speed rail network).

created by the UN, the UN probably can do little to alleviate them. Reform efforts must originate primarily with individual member states. Innovative reform efforts by the UN will likely be ineffective for the simple reason that such efforts do not and cannot address these three root causes, which lie beyond the UN's reach. Tinkering with the composition of the Security Council, for example, will have no effect on these underlying conditions and may indeed exacerbate power disparities by engendering greater paralysis in the Security Council, and thus encouraging the United States to bypass the Council with even greater frequency in future contentious circumstances.

The best that the UN can therefore do is to help lay the groundwork for the creation—by member states—of conditions in which the use of force can realistically be regulated by law. The most important contribution the UN can make would thus be to encourage member states to recognize the seriousness of the problem and to drop the pretense that use of force rules are working as they should. They do not. In the meantime, the UN can continue to test the waters to see whether the international community is coming any closer to a genuine consensus. The General Assembly is the perfect laboratory in which to do this, and a trial balloon of the sort floated by the Secretary General in the 1999 address that I referred to a moment ago, is the perfect medium for doing so. If and when the results are more promising than they were in 1999, a conference might than be convened to consider possible amendments to the UN Charter. Given the deep-seatedness of the three conditions that I outlined above, however, it is highly unlikely that any meaningful amendments can occur any time in the future.

Let me turn, finally, to the United States. How should the United States respond to the collapse of the legal regime governing the use of force? First of all, we need to recognize this is not the end of the world. The UN, as the Secretary General of the UN Kofi Annan so wisely observed recently, is not an end in itself. It is a means to an end. It is possible to pursue the ends of the UN—a more peaceful and just world—through other means.

In the 19th century, for example, a coalition of the willing was extremely successful in establishing peace on the continent of Europe for the better part of that century. It was called the Concert of Europe.[31] It originated in the Congress of Vienna following the Napoleonic wars in

31. *See* HENRY KISSINGER, DIPLOMACY 78-102 (1994).

1815, and it worked.[32] The number of casualties on the European continent during the 19th century was reduced to one-seventh the number that had occurred there during the 18th century—largely, historians tell us, as a result of the effectiveness of this consortium of European powers that kept the peace.

So it's possible to achieve some of the ends of the UN in the face of the collapse of the legalist order—perhaps even more effectively than might be possible under the UN Charter. Consider NATO's action in Kosovo. Let's be frank about this: if the UN Charter had been complied with, tens of thousands of people alive today would not be alive because NATO would not have used force against Yugoslavia absent Security Council approval. Those people are alive because NATO was willing to take the bull by the horns and "just do it"—to use force to achieve the end of justice. There is no reason why that cannot be done again.

Second, the United States needs to deal with the world as it is, not the world as it should be, not the world as it might have been, not the world as we would prefer it to be, but the world as it is. Henry Cabot Lodge said there is "grave danger in unshared idealism."[33] It's fine to be idealistic, but the first task is to recognize when that idealism is unshared, lest we be a victim of our own ideals.

All this suggests to me the need for new clarity in the ends and the means of American foreign policy. Let me talk about each of those in turn.

First, the ends or objectives. The objective of American foreign policy is to set out quite clearly in the national security strategy statement. It is to preserve American preeminence. Contrary to what some critics suggest, this is not a new objective. Madeline Albright was famous for going around the world—infamous some might say—declaring the United States to be the world's one "indispensable nation."[34] Some people didn't much like hearing that, but it turned out in retrospect to be quite true. Indeed, when the Reagan administration decided to seek the dissolution of the

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32. *See id.*

33. Henry Cabot Lodge, Address in Washington D.C. on 12 August 1919, *at* http://www.firstworldwar.com/source/lodge_leagueofnations.htm (last visited Nov. 4, 2004).

34. President Clinton used the term "the indispensable nation" in a speech on December 5, 1996, later echoed by Secretary of State Madeleine Albright at that time. *See* White House Press Release, Remarks by the President in Announcement of New Cabinet Offices (Dec. 5, 1996), *at* http://www.hri.org/news/usa/usia/1996/96-12-05.usia.html (last visited Nov. 4, 2004).

Soviet Union, it became clear that absent the "evil empire," as he called it, the United States would emerge as the world's sole superpower.[35] Now, whether it was useful diplomatically to articulate this objective as boldly as Secretary Albright did, or as plainly as the national security strategy statement did, is another question. But was it useful, is it useful, does it make sense for American policymakers to pursue the objective of maintaining American hegemony? In my view, absolutely; and it seems to me that the propriety of that objective for American policymakers ought indeed be seen as beyond dispute—for the simple reason that we live in a world in which other states in the international system also seek to enhance their security by enhancing their power.

As I suggested a moment ago, that is how the international system works. It is not correct, as some suggest, that the individual interest of actors within that system always, necessarily, corresponds with the collective interest. All states sometimes find themselves in a situation in which their own national security interests conflict with the collective interest, and when they do, they opt for their own national interest. That is what I believe the United States should continue to do.

France, I might just mention again, is a perfect example of what I'm talking about. French decision makers are very forthright about this—Hubert Védrine even wrote a book about it a few years back,[36] and his successor, Dominique de Villepin was very forthright about this. The aim of French foreign policy is to return the world to a multipolar configuration of power, to end American hegemony. The aim, in other words, is to narrow the gap of power that exists between the United States, France, Russia, and China. Note that the aim of French decision makers is not to narrow the gap in power that exists between France and third-tier power competitors, such as Spain and Poland. No, when they have the "uppityness" to sign a letter supporting the United States at the time of the recent conflict in Iraq, they are told that they are "not well brought up." So it's not simply the United States that acts to enhance its security by enhancing its power.

I do not fault the French, the Russians, or the Chinese for seeking greater power at the expense of the United States. If American decisionmakers were sitting in Berlin, Moscow, or Beijing, they would probably be

35. *See* Ronald Reagan, Remarks at the Annual Convention of the National Association of Evangelicals (Mar. 8, 1983).

36. HUBERT VÉDRINE, FRANCE IN AN AGE OF GLOBALIZATION (2001).

acting very much as French, Chinese, and Russian decision-makers are acting. By the same token, however, it seems to me inappropriate for them to point the finger at the United States, and to suggest that they would be acting any differently if they were sitting in Washington and determining whether the United States should seek to preserve its hegemony.

I might say, just as a Bostonian, it always has struck me that the counter-hegemonists seem inexplicably silent when it comes to what seems to me to be the greatest, most brutal abuse of hegemonic power in the 21st century. I'm referring, of course, to the New York Yankees signing A-Rod. I mean [laughter], where were the counter-hegemonists? Why didn't they explain to George Steinbrenner[37] that the Yankees would be better off if baseball were more competitive, if the Yankees only lost a few more games, and Boston won a few more games? I mean, let the poor Red Sox win, along with Russia, China, and the other power competitors, right? That seems to be the upshot of their theory. So, by rights the United States need make no apology for attempting to preserve its preeminence. Every other state sitting in our position would be doing exactly the same thing.

Let me talk for a minute about means. Some have suggested that the debate about means is a debate, really, about unilateralism versus multilateralism, and that the pursuit of American power counsels unilateral means. I disagree with that. Indeed, I would suggest to you that the whole debate over unilateralism versus multilateralism is misdirected. I believe that these are not in fact oppositional categories. Multilateralism can, in fact, promote the United States' capacity to act unilaterally and can indeed tend to preserve the unipolar configuration of power by enhancing American soft power. Multilateral means soften the jagged edges of hegemony. It's much more effective to win friends by persuading them that they want to do what you want to do rather than by making them do [what you want to do]. It's in our long-term strategic interest, therefore, to cultivate institutions that will redound to our net benefit even if that may involve some short-term sacrifice, as all international institutions do. I do not foreclose the possibility that American power, like the power of other hegemonic states in the past, will not last forever. Prudent decision-makers in Washington, recognizing that possibility, need to invest in international institutions by seeking to ensure that American interests are protected by law,

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37. George Steinbrenner bought the New York Yankees on 3 January 1973. *See* Michael Aubrecht, Baseball Almanac, *George Steinbrenner Biography*, *at* http://www.baseball-almanac.com/articles/george_steinbrenner_biography.shtml (last visited Nov. 4, 2004).

should the day ever come when relative military superiority cannot be relied upon to do that. So the real question is not whether to act unilaterally or multilaterally; the real question is the extent to which the United States should subject itself to international legal institutions and regimes.

I want to underscore in this regard the point that I just made. These international institutions can, if dealt with properly, *enhance* American power. They can *advance* our interest in maintaining American hegemony. We are now, for example, dealing with a UN team in Iraq that has helped persuade the Iraqis that a certain schedule be adhered to in holding elections. That, it turns out, has been recommended by the United States, and it makes sense. It's useful to have a neutral, impartial international arbiter or jury, say to interested parties, like the Iraqis, "Hey, guess what? The Americans happen to be right." I would think that it would be useful to have UN weapons inspectors at our sides in Iraq in the event that weapons of mass destruction are discovered—for the simple reason that we have a national interest in being believed. We are more likely to be believed if weapons inspectors from UN say, again, "Guess what? The Americans are right."

So I do not believe that it would be in our long-term interest for the United States to seek to, as George Will has recommended, "deligitimate" the UN.[38] Why would we want to destroy a tool that can be used to advance American power? The trick is to decide—the test of statesmanship is to determine—when these institutions in fact advance American power and when they undercut American power. This requires a very careful long-term calculus, looking at the costs and benefits of adherence to each institution, institution by institution, one institution after the other.

We need, in this process, to be aware of the danger of getting locked into a situation in which we are dependent upon the legitimacy that that institution can confer. Our aim ultimately has to be to maintain the ability to act unilaterally when it is in our national security interests to do that. It's possible to get too habituated to the legitimacy that these international institutions can provide; we need to recognize that recourse to those insti-

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38. *See* Press Release, George F. Will, *The UN Is a Bad Idea* (Mar. 13, 2003), *available at* http://www.townhall.com/columnists/georgewill/gw20030313.shtml (last visited Nov. 4, 2004). Pulitzer Prize recipient for Newspaper Commentary, George F. Will, has been a *Washington Post* Syndicated Columnist since 1974. His column appears today in more than 460 newspapers. He is an author and *ABC-TV* network-television broadcaster commentator. *See id.*

tutions is not always automatically appropriate even though they can provide additional legitimacy.

The final example that I'll give you in this regard is Afghanistan. After 9/11, the United States could have gone to the UN Security Council and sought authorization to use force against Afghanistan. Now, you might say, why would we have done that? It was permissible under Article 51 of the [UN Charter]. We were the subject of an armed attack. To use force against Afghanistan without Security Council approval would have been permissible under the Charter. You are, of course, correct. But you are also correct in thinking that could have been done at the time of the first Gulf War. Remember, after all, Kuwait was attacked by Iraq, and the United States stood in the stead of Kuwait, for purposes of use of force under Article 51. The use of force by the United States would have been permissible against Iraq without Security Council authorization. I believe that this was a wise decision made by this administration in not going to the Security Council to get its permission to use force against Afghanistan—for precisely the reasons that I have outlined. We need to avoid getting locked into a situation in which we have become reliant on the boost that UN legitimacy can provide in controversial circumstances where our national security is on the line.

I want to close with you today on a personal note. Last fall, I had the pleasure of speaking at the George Marshall Center in Garmisch, and meeting the director of the international program there, Mike Schmitt, a fine scholar whom I understand gave this same lecture here last year.[39] It's a tremendous place. As some of you know, you're not going to get "imminent danger" pay for service there. It's not exactly a hardship assignment. It's a place that one notes in one's notebook to return to when one has a few days of spare time. On one of the afternoons that I had free, I took the train into Munich, and took a streetcar outside of Munich, and spent the afternoon walking around the concentration camp at Dachau. As you can imagine—I'm sure a number of you have done that—it is a horrific experience. The place is, in many respects, perfectly preserved from how it was left at the end of the war, right down to the showerheads. The vent where they poured in the poison gas pellets, into the shower room, still works. The handles still turn. It is absolutely stomach wrenching. Anyway, as you walk around Dachau, you see lots of memorials to the memory of people

39. *See* Michael N. Schmitt, Lecture, The Judge Advocate General's Legal Center and School, U.S. Army (28 Feb. 2003), *The Sixteenth Waldemar A. Solf Lecture in International Law*, *in* 176 MIL. L. REV. 364 (2003).

who died there, but the curious thing is that you find, among all these memorials, only one memorial that actually thanks anybody. That one memorial doesn't thank the League of Nations, Kellogg or Briand, or the World Council of Churches, or Immanuel Kant for his "categorical imperative."[40] It thanks the United States Seventh Army—for liberating the place. Sometimes, the use of force, regrettable though it may be, is the only way to bring barbarism to an end. John Stewart Mill, I think, got it right. He said, "War is an ugly thing, but it is not the ugliest of things."[41] I saw the ugliest of things that afternoon, and I never want to see it again, and if we are not to see it again, we need always to remember that sometimes, not always, but sometimes, the U.S. military—not the community of nations, not the UN, not international law, but the U.S. military—is all that stands between humanity and the ugliest of things. Thank you.

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40. IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 25-27 (Mary J. Gregor, et al, eds., Cambridge Univ. Press 1998).

41. John Stuart Mill, "The Contest in America," *Dissertations and Discussions*, 26 (1868). First published in *Fraser's Magazine*, Feb. 1862, *available at* http://www.bartleby.com/73/1934.html (last visited Nov. 3, 2004).

THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM[1]

REVIEWED BY DALE STEPHENS[2] & ROSALIND DIXON[3]

In most writings on international law, it seems convenient to portray the military and international humanitarian lawyers as talking different and opposing languages. The military speak the language of Washington, while humanitarians speak the language(s) of Geneva. The military are the "insiders" and international humanitarians the "outsiders." The military use force; humanitarians restrain it. The military represent power and humanitarians try to speak truth to power.

There is, of course, something fundamentally wrong in this picture. The modern humanitarian law project has, in fact, very successfully inculcated military decision-making with a resolute humanitarian vocabulary and sensibility. Organizations such as the International Committee of the Red Cross have successfully worked in close partnership with many professional militaries to ensure the effective realization of many universally accepted humanitarian goals.

Most writings by international law scholars do not seem to fully appreciate these developments. Not so, David Kennedy's new book, *The Dark Sides of Virtue*, which provides an extremely novel and important contribution to our understanding of the relationship between international humanitarianism and the military. In contrast to previous scholarship, *The Dark Sides of Virtue* highlights the successful nature of the military-humanitarian collaboration. In doing so, however, the book also highlights the ambivalence that both sides bring to this collaboration, and it provides real insight into questions about why things can go wrong on the ground, when military and humanitarian projects are joined.

Additionally, the book will be of interest to civilians and to military officers outside the Judge Advocate Generals' Corps, for its portrayal of life aboard the *USS Independence*. In recounting the week he spent in the Gulf in 1998 aboard the aircraft carrier, Kennedy brings an acute sense of

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1. DAVID KENNEDY, THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM (2004).

2. Commander, Royal Australian Navy, BA (Flin.), LL.B. (Hons) (Adel.), GDLP (SAIT), LL.M. (Melb.) LL.M. (Harvard).

3. B.A./LL.B. (UNSW), LL.M. (Harvard), SJD Candidate, Harvard University.

observation and a wonderful gift for language. In particular, his reflections on the manner in which legal issues are processed in good faith by operators facing a combat situation are particularly uncanny. Indeed, it would be hard to point to a better literary portrait of life aboard a warship than that provided by Kennedy.

In his arguments for reform, Kennedy's message also speaks in another way to the military as a whole. Throughout the book, he poses some hard questions about how we should think about the manner in which we see ourselves as military and humanitarian professionals, and the relationship between law, military efficiency, and other discourses which are deserving of serious reflection.

A. Outline

The book is built around Kennedy's provocative 2001 article, *The International Human Rights Movement: Part of the Problem?*,[4] in which he outlined nine potential "dark sides" to the international human rights project.[5] In the various chapters of the book, Kennedy goes on to illustrate these dark sides, by drawing on his previous writing about the human rights movement,[6] law and development,[7] law and European integration,[8] and refugee law and protection.[9] (Those familiar with his work will note that the book includes revised versions of his extremely well-known previous articles, "*Spring Break*"[10] and "*Autumn Weekends.*"[11]) Previously unpublished in its entirety, Kennedy illustrates his arguments concerning the dark sides of international humanitarianism by reference to the military context.[12] He concludes with reflections on "*What Humanitarianism Should Become*"—proposing some tentative answers to the provocative questions asked by Kennedy in 2001.[13]

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4. 3 EUR. HUM. RTS. L. REV. 245 (2001), *reprinted in* 15 HARV. HUM. RTS. J. 99 (2002).

5. KENNEDY, *supra* note 1, at 3.

6. *See id.* at 37-83 (ch. 2).

7. *See id.* at 111-46 (ch. 4); 149-67 (ch. 5).

8. *See id.* at 169-97 (ch. 6).

9. *See id.* at 199-233 (ch. 7).

10. 63 TEXAS L. REV. 1377 (1985).

11. Autumn Weekends: An Essay on Law and Everyday Life *in* AUSTIN SARAT & THOMAS R KEARNS, LAW AND EVERYDAY LIFE 191 (1993).

12. KENNEDY, *supra* note 1, ch. 8, at 235.

13. *See id.* ch. 9, at 327.

B. Kennedy's Arguments

In Chapter 8 of the book, Kennedy starts by outlining the history of the law governing the resort to war (*jus ad bellum*) and the law in war (*jus in bello*).[14] Of particular interest, he shows how much of the impetus for the regulation of war came from those in, and close to, the military itself. For instance, the 1868 St. Petersburg Declaration renouncing the use of specific explosive projectiles was sponsored by the Russian war minister.[15] The U.S. Government instructions for Union troops in the field was written by Columbia Professor Francis Lieber, who had sons fighting on both sides.[16]

Interestingly, Kennedy also analyzes the political strategy of the international humanitarian movement and its historic shift of emphasis from promoting "bright line" rules in war in the late Nineteenth Century to its focus on broader all encompassing "standards" of regulation in the Twentieth and Twenty-First centuries[17] (*i.e.* the introduction of concepts such as necessity, proportionality, incidental/collateral damage, concrete military advantage). Kennedy is critical in viewing these developments as a "great march forward" for the Law of Armed Conflict, and is intent on highlighting their inherent biases and blind spots.[18]

1. Privileging the Status Quo

In his critique of *jus ad bellum*, Kennedy observes that the law takes state sovereignty as its norm and puts the onus on those "intervening" to justify their actions. This, according to Kennedy, is a state-centered way of thinking which may tip the balance against military intervention when it in fact would be desirable.[19] Once one sees things in this way, it is perhaps not surprising that international law scholars have developed a concept of "illegal but legitimate" humanitarian intervention. Kennedy argues that we should have a less binary, status quo favoring view of "intervention." He says that we intervene all the time through development, trade, and other commercial policies—and that, perhaps, military intervention should not be seen as *so* radically discontinuous from that. We should

14. *See id.* at 242.
15. *See id.* at 238.
16. *See id.* at 238-39.
17. *See id.* at 271, 298, 317.
18. *See id.* at 298-307.
19. *See id.* at 262-6.

be pragmatic about what good intervention will do, rather than focused on legal onuses.[20]

2. Confusing the Project with Progress

In what is possibly the enduring theme of the humanitarian/military analysis, Kennedy posits that international humanitarians champion the *jus ad bellum* and *jus in bello*. The institutions which develop these bodies of law and give them effect, more as ideology than as a useful measure for realizing humanitarian goals.[21] Kennedy consistently argues that this perspective on the law can obscure realistic assessment of humanitarian utility.

In the context of military intervention, Kennedy argues that this focus on legality and institutional legitimacy may divert us from a more substantive inquiry about whether military force is actually going to deal with problems on the ground. He suggests that the focus among international lawyers in 2003 on the necessity for clear Security Council authorization for the war in Iraq became a substitute for a truly pragmatic inquiry about whether military means were a good way of achieving democracy-building or dealing with weapons proliferation or the threat of Saddam Hussein.[22] Lawfulness, Kennedy argues, can become a substitute for practical benefits—in the same way that heroic talk at the United Nations on Third World conditions can become a substitute for real progress on fighting poverty on the ground.

Kennedy thus argues that humanitarians and military lawyers need to be careful not to mistake progress on international law for progress on the ground. We should worry more about concrete outcomes and not risk everything on long-term institution-building goals. That is, pragmatic and concrete cost/benefit analysis should shape the direction of the law more concertedly than allegiance to the 'law as ideology' perspective of the law of armed conflict. In this context he questions, for example, our allegiance to the principle of distinction, poignantly asking why a young draftee should get the 'benefit' of being a lawful combatant (and therefore target) in an armed conflict while the civilian power structure that is likely the key propagator of the war remains immune from attack,[23] even when

20. *See id.* at 351.
21. *See id.* at 277-80.
22. *See id.* at 279.

such an attack would surely shorten the length and suffering of a conflict. As professional military officers we might first recoil from such a direct assault on *jus in bello* orthodoxy, but, in terms of practical and humanitarian outcomes, such arguments have some appeal.

3. Amorphous Standards

According to Kennedy, the limits of the law are manifested in the very ambiguities of the standards adopted. Moreover, the 'enchantment' of the tools of analysis contained within the law of armed conflict means that these ambiguities are too readily glossed over in favor of promoting the "upward spiral of humanitarianism."[24] Concepts such as proportionality remain amorphous and, Kennedy suggests, are dependent more on the perceived legitimacy of the conflict than any kind of absolute measure.[25]

He notes that the infusion of legally amorphous concepts into Rules of Engagement can result in unclear guidance where, in certain factual situations, legal permissions and prohibitions collide and a "judgment call" from the operator is often required.[26] Victory is seen as the great vindicator of decisions made. The law ceases to govern and guide, but rather "common sense" is necessary to achieve the best possible outcome all in a slightly disassociated name of the law.

In making the argument about the limits of the international law vocabulary, Kennedy also points to the International Court of Justice's decision on the legality of nuclear weapons. He notes that the Court in that case clearly had difficulty in applying the principles of the law of armed conflict in the context of assessing the lawfulness of nuclear weapons.[27] Indeed, while not specifically highlighted by Kennedy, the opinion itself famously contains the view of one Justice opining that the concept of proportionality is basically 'meaningless' in the realm of nuclear weapons.[28]

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23. *See id.* at 270-1.
24. *See id.* at 279.
25. *See id.* at 274-7.
26. *See id.* at 270, 290-1.
27. *See id.* at 319-22.
28. *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, International Court of Justice (July 8, 1996), *available at* http://www.icj-cij.org/icjwww/icases/iunan/iunanframe.htm (last visited Oct. 29, 2004) (providing the dissenting opinion of Judge Weeramantary).

4. Pulling Back from Responsibility

Kennedy further argues that humanitarians and military professionals often pull back from embracing the ultimate consequences of the legal standards they advocate, as applied on the battlefield. For example, Kennedy notes:

> The humanitarian seems to reserve the right to exit the conversation, to depart the vocabulary of pragmatism about consequences, while the military planner must remain within it. Watching discussions between students with military and humanitarian backgrounds, one often feels the military's frustration after walking through a lengthy analysis of costs and benefits and proportionality and necessity, only to be denounced as inhumane — "these civilians can just say *anything*." They lack discipline.[29]

Kennedy, however, also suggests that military professionals may pull back from the full implications of proportionality-style reasoning.

In this regard, he notes:

> Humanitarians are not alone in experiencing a taboo around the pragmatic assessment of consequences. The military strategist is rarely any more willing to complete the pragmatic analysis called for by the humanitarian law vocabulary. When critics ask how many civilians the military is willing to kill in pursuit of this or that objective, the strategist will also often simply restate the principle — "our soldiers have the right to defend themselves" — or explain that the answer is a matter of "judgment." Like humanitarians, strategists may also step outside to a more absolute vocabulary — here of consequences, invoking the military mission, force protection or simply victory —we will "do our job" or "protect our soldiers."[30]

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29. KENNEDY, *supra* note 1, at 282.
30. *Id.* at 332.

5. Further Denial—Iinternational Law as Empowering Rather than Restraining?

Kennedy further argues that, as international humanitarians and military strategists, we deny the way in which our common vocabulary can encourage and empower the use of force as much as restrain it. Banning land-mines, for example, when they are no longer particularly useful or desirable for military purposes, may simply act to further legitimize other forms of warfare as "clean" or legitimate.[31] Legal branch talk of the concepts of necessity and proportionality may simply make military officers feel more justified in killing civilians when faced with difficult choices about trading-off civilian and military lives. The vagueness of international law standards seems to relieve us of taking responsibility for these difficult trade-offs—so that, ultimately, no one feels responsible for making them.[32] That is, civilians get killed without *anyone*—either in the chain of military command, or in the offices of civilian and humanitarian control—feeling responsible.

In this pragmatic vein, Kennedy asserts that when other discourses prove helpful to the humanitarian project, we should embrace them. In the military decision-making context, religious and ethical discourses[33] have been largely silenced in favor of advocating the universality of legal standards in armed conflict. Against this trend, Kennedy suggests that it is perhaps time to revisit such discourses, at least when the law reaches its own limits of usefulness.

Most importantly, Kennedy argues that there will not be a truly effective form of pragmatic humanitarianism—either in the deployment of the military, or in any other sphere of international action—without a more fundamental shift in our self-understanding. That is, he argues that humanitarians need to stop thinking of themselves as strangers to and critics of power; they need to favor a self-conscious awareness of actual power and a will to governance.[34] Military readers may feel that this injunction is not directed to them; after all, they already know the awesome power which comes with the hardware they deploy.

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31. *See id.* at 297.
32. *See id.* at 314.
33. *See id.* at 278, 276.
34. *See id.* at 277, 348-49.

Kennedy argues, however, that military professionals—like humanitarian lawyers—also shy away from taking full responsibility for their actions. They do not fully acknowledge the power each individual has to make decisions within our sphere of responsibility, instead seeking refuge from individual and collective responsibility behind military codes, chains of command, and vague international law concepts of necessity and proportionality.[35]

C. Comment

Kennedy's book provides a very real challenge to military professionals, along with international humanitarians, to rethink how they approach issues of power and decision-making. Many of Kennedy's suggestions for reform may be readily embraced by decision-makers in the military context. For example, a "status quo" bias in favor of sovereignty has come under significant challenge in recent missions such as that in Kosovo, and even more starkly, in Iraq. Within the military, attachment to the project of "international law building" has, arguably, always been more pragmatic than many non-governmental contexts. Given the nature of most combat operations, military decision-makers are likely to be sympathetic to a call for greater attention to short- and medium-term consequences on the ground. Many officers will readily accept the need to take even greater responsibility for their decisions, though they will likely also rightly point to the challenges this entails given the complex structures of decision-making and responsibility in the chain of command.

Some of Kennedy's proposals for reform may, however, meet more resistance in other contexts. For instance, Kennedy's call for a more pragmatic calculus might be thought to support the argument that the *jus in bello* has no useful role to play in the context of the war against terrorism. In this context, while military lawyers will readily admit the limitations of the current *jus in bello* and the potential need to adapt its rules to new conditions and its demonstrated failures, most would argue that *jus in bello* has the potential to develop in ways which respond to these challenges. That is, we would not give up on the potential to reform the *jus in bello*, to provide both a stronger set of bright-line constraints, and a set of norms more

35. *See id.* at 312-13, 332.

adapted to the imperatives of new military challenges—whatever dangers of distortion it may bring.

Recent events suggest that it may be a particularly precarious time to abandon a project of legal reform in favor of a vocabulary of pure pragmatic decisionism.

Whether or not one accepts the entirety of his proposals for reform, however, Kennedy's book should spark a very important debate within the military about the ways in which power and responsibility may be deflected and denied under the rubric of the law of armed conflict and how humanitarian goals consistent with mission success may be truly achieved. It is therefore important reading for all military professionals.

JUSTICE AT DACHAU[1]

REVIEWED BY MAJOR WARREN L. WELLS[2]

> *If you are determined to execute a man in any case, there is no occasion for a trial . . . . Lynch law . . .often gets the right man. But its aftermath is a contempt for the law, a contempt that breeds more criminals. It is far, far better that some guilty men escape than that the idea of law be endangered. In the long run, the idea of law is our best defense against Nazism in all its forms.*[3]

When President George W. Bush authorized the use of military tribunals to try suspected terrorists and their aiders and abettors,[4] critics wondered whether the system would provide due process of law to the men detained at Guantanamo Bay, Cuba.[5] Critics claimed that military tribunals would make a mockery of the justice system under the rule of law.[6] Military attorneys helped prepare tribunal rules and procedures in order to

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1. JOSHUA M. GREENE, JUSTICE AT DACHAU: THE TRIALS OF AN AMERICAN PROSECUTOR (2003).

2. U.S. Army. Instructor, Military Justice, Air Force Judge Advocate General's School, Maxwell Air Force Base, Montgomery, Alabama.

3. GREENE, *supra* note 1, at 115 (quoting Lieutenant Colonel (LTC) Douglas T. Bates, chief defense counsel of former Dachau concentration camp administrators).

4. *See* Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

5. *See, e.g.*, Michael Eric Dyson, Editorial, *Basic Rights Under Siege*, CHI. SUN-TIMES, Nov. 20, 2001, at 29 (arguing that trying suspected terrorists before military tribunals is "dangerous, even frightening" because the tribunals are a "threat to the moral and legal fabric of [our] society;" and that they may result in a "rejection . . . of due process" that "smacks of injustice"); Katharine Q. Seelye, *A Nation Challenged: The Military Tribunals*, N.Y. TIMES, Dec. 8, 2001, at B7 (reporting more than 300 law professors were protesting the presidential order for military tribunals).

6. *See, e.g.*, Frank Davies, *Plan to Try Terrorists Raises Debate Over Powers*, MIAMI HERALD, Nov. 15, 2001, at 27A (reporting that some activists and legislators questioned the President's power to order tribunals and the wisdom of having proceedings that omit rights provided to citizens in ordinary criminal trials); Todd J. Gillman, *Tribunal Raises Civil Rights Questions; Cheney Defends Military Court; Others Say It Sidesteps Constitution*, DALLAS MORNING NEWS, Nov. 15, 2001, at 1A (quoting critics who called the authorization of military tribunals "unprecedented" without a declaration of war, "hypocritical," a "suspension of civil rights" that should be "an impeachable offense," and "too costly to fundamental rights").

preserve the integrity of the justice system and also accomplish the President's objective of efficiently punishing wrongdoers.[7]

According to Joshua Greene, military attorneys trying Nazi concentration camp guards and administrators were equally concerned about perceptions that their tribunals lacked due process.[8] Like the pending tribunals of the early 21st century, the tribunals of 1945-47 received their fair share of criticism. For example, Supreme Court Justice Harlan Stone compared the war crimes trials in Nuremburg to a "lynching party" and a "pretense" court, while Senator Robert Taft argued that the "spirit of vengeance" at the trials threatened to overshadow history's view of justice meted out there.[9]

One of Greene's primary themes in *Justice at Dachau* is that the military tribunals of the late 1940s, and particularly the advocacy of prosecutor William Denson, succeeded in obtaining a one-hundred percent conviction rate while affording defendants fair trials with full due process rights.[10] Greene's other focus of the book is to honor Denson's work and to educate the public about the often-overlooked trials.[11] In the end, Greene provides details enough to whet the reader's appetite, but he leaves his literary guests hungry in all three areas.

Denson and Due Process

The subtitle of *Justice at Dachau, The Trials of an American Prosecutor*, focuses on the efforts of LTC William Denson, the chief prosecutor of the leaders of the Dachau, Mauthausen, Flossenburg, and Buchenwald concentration camps. While Denson was only a part of the system of prosecutors and defenders created to conduct war crime tribunals through-

7. *See A Nation Challenged*, N.Y. TIMES, Dec. 7, 2001, at B6 (providing excerpts from Attorney General John Ashcroft's testimony before the Senate Judicial Committee regarding the Bush administration's vision regarding military tribunals for suspected terrorists).

8. *See* GREENE, *supra* note 1, at 231-32.

9. *Id.*

10. *See id.* at 357.

11. *See id.* at 4.

out Germany,[12] he personally tried more Nazis than any other single prosecutor.[13]

In all, William Denson spent almost two years prosecuting officials of four of the most notorious German concentration camps.[14] According to Greene, Denson logged long hours and expended superhuman effort to ensure that prosecutions were both just and impartial.[15] Denson, the author asserts, wanted to conduct the trials so that observers from throughout the world and historians would not ascribe harsh sentences to "victors' justice," but to the validity of charges and evidence brought before tribunals that afforded due process of law.[16] Greene concludes that Denson's efforts validated the effective use of tribunals, and that Denson's "greatest contribution [was getting] convictions according to due process and recognized international law."[17]

Unfortunately for LTC Denson, Greene fails to clearly show how his protagonist sought complete due process for the 177 German concentration-camp officials[18] he prosecuted. While William Denson may have intended to convict with due process, the illustrations Greene uses undercut that proposition. For example, numerous defendants claimed that American interrogators, including Denson's lead investigator, Lieutenant (LT) Paul Guth, coerced incriminating statements from them.[19] Denson never seriously investigated such allegations,[20] even after other investigations substantiated claims that some American interrogators engaged in abuses.[21] If investigators coerced statements from Germans, those confessions have far less credibility. On several occasions when defendants tried to explain away their written confessions as coerced, Denson

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12. *See id.* at 16. At the conclusion of World War II, judge advocates conducted 189 war crimes tribunals involving 1,672 defendants in Germany and Japan. *See id.* Lieutenant Colonel Denson prosecuted 177 defendants before four tribunals. *See id.* at 2.

13. *See id.*

14. *See id.*

15. *See id.* at 232-33.

16. *See id.* at 3, 119.

17. *Id.* at 357.

18. *See id.* at 2.

19. *See id.* at 76-77, 179-80, 186, 202, 262.

20. *See id.* at 187. Greene writes, "The repeated accusations concerning young Paul Guth's interrogations could not be ignored. Denson wanted wins, but not like that, and he truly believed the rumors to be nothing more than a defense tactic." *Id.* Greene's characterization, however, of not "ignore[ing]" the accusations consists of an intense cross examination in which Denson repeated asks whether the witness handwrote wrote the statement himself. *See id.*

objected, arguing that allegations of coercion by American interrogators were irrelevant to the proceedings.[22] Testimony about why a defendant made an incriminating statement is unquestionably relevant when the government introduces that statement against the defendant.[23]

The charge Denson used also raises due process concerns. Denson indicted all 177 of the people he prosecuted with the same charge of "acting in pursuance of a common design to commit" crimes such as murder, torture, "abuses and indignities."[24] It was a vague charge.[25] Defense counsel, who represented multiple defendants at the same trial,[26] found it difficult to prepare specific defenses against such a vague and relatively novel charge.[27] The document authorizing tribunals in post-war Germany stated, "[t]he Indictment shall include full particulars specifying in detail the charges against the Defendants."[28] Despite that, Denson vigorously fought defense objections to both mass trials and indistinct charges.[29]

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21. *See id.* at 232, 262. Among those interrogators confirmed to have acted improperly were several stationed at Freising, Germany, which is where LT Guth worked before he moved to Dachau. *See id.* at 256, 262. Similarly, another American-led tribunal held at Dachau convicted seventy-four German Soldiers of massacring prisoners near Malmedy, Belgium during the Battle of the Bulge. These convictions were based on seventy-four confessions that the defendants claimed were involuntary. *See* MICHAEL REYNOLDS, THE DEVIL'S ADJUTANT 256-57 (1995). The Soldiers' American defense attorney, LTC Willis M. Everett, filed a writ of habeas corpus to the Supreme Court alleging that American interrogators withheld food and blankets, subjected prisoners to beatings, told prisoners that their families were in danger, showed prisoners "execution chambers" where bullet holes in the wall included human hair and flesh, put hangman's nooses around their necks, and subjected them to mock trials with interrogators posing as defense counsel. *See id.* An administrative review board appointed to investigate the allegations determined that, for the most part, there was insufficient evidence to substantiate claims of physical abuse, but the board confirmed the use of staged trials to elicit statements. *See* Evan J. Wallach, *The Procedural And Evidentiary Rules of the Post-World War II War Crimes Trials: Did They Provide An Outline For International Legal Procedure?*, 37 COLUM. J. TRANSNAT'L L. 851, 870 (1999) (citing U.S. War Department, Final Report of Proceedings of Adminstration of Justice Review Board (The Raymond Report) (Feb. 14, 1949)).

22. *See id.* at 76-77, 186, 203. For example, one 22-year-old defendant had been beaten and received threats of being shot. In response to such evidence, LTC Denson immediately objected to "testimony along this line unless it has some connection with this case." *Id.* at 202-03.

23. *See, e.g.*, Brown v. Mississippi, 297 U.S. 278 (1936) (holding that coerced confessions violate due process).

24. *Id.* at 41.

25. *See id.* at 189.

26. *See id.* at 116.

Moreover, he refused defense requests for a bill of particulars specifically stating the alleged wrongdoings by each defendant.[30]

The indistinct "common design" charge appears especially unfair if defense claims of insufficient evidence were true.[31] Excerpts from defense arguments indicate that the government provided no direct evidence of wrongdoing by some accused; counsel argued that with respect to some defendants, the government could only prove that they were assigned to the camp at some point during the war.[32] Apparently defense's argument struck a cord with Denson; on rebuttal argument Denson declined to get "into a discussion of each man individually, because," he urged tribunal members, "I do not want the court to feel that it is necessary to establish individual acts of misconduct to show guilt or innocence."[33] Common design, in Denson's view, was akin to guilt by association—in this case, association with the concentration camp system.[34]

Greene also adds defendants' and others' trial testimony which in some parts contradicts and discredits government evidence.[35] Greene

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27. *See id.* at 42-43, 136. One defense attorney claimed that "common design [was] not a crime." *Id.* at 136. Defense counsel in both the Dachau and Mauthausen trials unsuccessfully petitioned the tribunal to know exactly what wrongful acts each defendant had committed. One counsel specifically stated that knowing what acts his clients were charged with was "necessary" to "intelligently present a defense." *Id.* at 43. The other intimated as much when he pointed out that he had to prepare defenses for sixty-one clients covering three and a half years and alleging eighteen areas of criminal conduct which may or many not apply to each defendant. *See id.* at 136.

28. Charter of the International Military Tribunal art. 16(a), signed 6 October 1945, *available at* http://www.ess.uwe.ac.uk/documents/chtrimt.htm (last visited Oct. 26, 2004).

29. *See* GREENE, *supra* note 1, at 43, 136, 186..

30. *See id.* at 136.

31. *See id.* at 106-8.

32. *See id.*

33. *Id.* at 112.

34. *See id.* at 24, 205, 112. Denson's "mission [was] to bring to justice everyone who had been involved irrespective of title or authority." *Id.* at 24. The charge of acting in pursuance of a common design could be used against anyone who ever worked at or in support of a concentration camp, including doctors who gave comfort and treatment to the sick, work supervisors who gave prisoners extra food against the orders of the camp commandant, and even prisoners who acted as block leaders to keep fellow prisoners in line. *See id.* at 197-98, 202-04, 206, 214. Such a wide-reaching charge could be analogous to guilt by association; in this case, association with those who controlled conditions at the camp. In LTC Denson's mind, even though a defendant "may not have personally wielded the club," if he voluntarily worked in support of a camp, he "was guilty of a common design to torture, starve and kill prisoners and deserved to hang." *Id.* at 205, 213.

35. *See id.* at 184-85, 197-98, 200, 222.

provides no government rebuttal evidence, if there was any, nor does he indicate whether his reading of the trial transcripts bears out defense's condemnation of government evidence. He says that every man Denson tried was convicted, and ninety-seven were sentenced to die.[36] He also reveals that most defense counsel believed even before trials began that convictions were a *fait accompli*.[37] By not addressing the apparent lack of evidence as to some men, the reader is left to wonder whether certain defendants went to the gallows unjustly or whether the author failed to convey the strength of the prosecution's case.

Greene admits that some damning evidence presented to the tribunals would have been inadmissible in a typical U.S. criminal trial.[38] According to Greene, some witnesses "offered illogical testimony" in order to get revenge, and that it sometimes "breached the limits of credibility."[39] Since Denson was in charge of choosing witnesses to appear on behalf of the prosecution,[40] one wonders why he selected such witnesses if he wanted to give fair trials.

Whether or not Denson actively sought to show the world that his cases afforded fairness and due process, Greene's book gives less surety that tribunals gave each individual due process.[41] From the anecdotal evidence the book provides, tribunals rarely ruled in favor of the defense on motions or objections.[42] Furthermore, in the Dachau and Mauthausen trials, each tribunal deliberated just ninety minutes before handing down guilty verdicts for forty and sixty-one defendants, respectively.[43] Between the two trials, tribunal members gave less than two minutes deliberation for each man accused of a capital crime. After the trial for Dachau administrators, one tribunal member made a late-night, clandestine visit with LTC Douglas T. Bates, the chief defense counsel, telling Bates that "we have made a terrible mistake," and that he would be drafting a dissent.[44] The next day the former tribunal member told Bates that the

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36. *See id.* at 2.
37. *See id.* at 135
38. *See id.* at 159-60.
39. *Id.*
40. *See id.* at 55.
41. *See supra* note 34 and accompanying text (discussing common design compared to guilt by association).
42. *See* GREENE, *supra* note 1, at 43, 47, 50, 93, 100, 136, 156-67, 166-67, 199, 244-45, 252.
43. *See id.* at 115, 221.
44. *Id.* at 119-21.

meeting "never took place."[45] Bates went to his grave sure that his clients did not receive "a fair trial."[46] A member of William Denson's own prosecution team for the Buchenwald trial, attorney Solomon Surowitz, resigned mid-way through the proceedings disillusioned with the system and distrustful of his own witnesses, who Surowitz believed would "swear to anything if it g[ot] the Germans killed."[47]

Despite inadequacies, *Justice at Dachau* demonstrates that defendants enjoyed some due process rights. Defense counsel had full access to government files at the beginning of the war crimes program.[48] Defendants were allowed to utilize the right to counsel, to cross examine government witnesses, to make statements to the tribunal, and to have indictments and proceedings translated into a language they knew.[49] Greene notes that most German defendants were flabbergasted at the rights afforded them; they were amazed to receive a trial at all considering their prior government's *modis operandi*.[50]

Contrary to LTC Bates' view, Captain Victor Wegard, a lawyer on Bates' defense team, remembered that two prominent defendants, to include the Dachau camp commandant, told Wegard that they believed they got a fair trial and that the defense held the government to its burden of proof.[51] Denson's other teammate on the Buchenwald trial was so convinced that they "conducted th[e] trial in as fair and as humane a way as would be possible anywhere," that he rallied with Denson against the later commutation of some sentences.[52]

To counter defense arguments and satisfy readers that innocent men were not convicted, Greene should have better articulated what evidence convinced the tribunals of guilt. He should have provided more government evidence that rebutted the defendants' assertions and those of their witnesses. Including evidentiary photographs depicting camp horrors might have helped. The book did not compare Denson's 100 percent con-

45. *Id.* at 121.

46. *See id.* at 125-26.

47. *Id.* at 273.

48. *See id.* at 189-90. Prosecutors later curtailed such open discovery, bringing the tribunal system in line with the more limited disclosure practices then common among American criminal courts. *See id.*

49. *See id.* at 36.

50. *See id.*

51. *See id.* at 352.

52. *Id.* at 330.

viction rate to the overall war crimes tribunal conviction rate. Such a comparison would provide a better idea of Denson's contribution and give insight into the tribunals' willingness to acquit.

Since Denson's time at Dachau, numerous court decisions and laws have refined legal thought on due process.[53] Likewise, current events and societal conditions shape people's perception of what constitutes adequate due process.[54] Greene could have better explained the world's concept of due process at the end of World War II. By putting what happened in historical context with what the world expected, Greene could better show whether Denson achieved his goal of providing due process.

Honoring William Denson

In writing *Justice at Dachau*, Greene attempts to honor William Denson. Greene's purpose is noble, but his book never really brings Denson to life. From beginning to end, the reader wonders who William Denson really was and what shaped him as a man and an attorney. In the first half of the book Greene reveals that Denson, a soft-spoken Alabamian with a Harvard law school education, taught at West Point and tried over 300 civil cases by the time he was thirty-one years old.[55] The reader never learns about Denson's childhood, whether he had siblings, the type of law practice he had before teaching at West Point, his struggles and successes in his early law practice, the type of military service he acquired before he became a judge advocate, whether he volunteered for military service when the war broke out or whether he was called out of the reserves, or whether he asked to go to Germany or was ordered to go. Greene hints that Denson's father was a strict, demanding man who had a great influence on his son, but he never directly addresses the senior Denson or his role in William Denson's life.[56] Greene provides a pleasant side story about Denson's courtship of his second wife, Huschi, a German aristocrat-turned-refugee.[57] More such stories would personalize Denson. While

53. *See* George F. Will, Editorial, *Trials and Terrorists*, WASH. POST, Nov. 22, 2001, at A47 (defending the use of military tribunals to try modern terrorists, by noting that the Constitution left "due process" undefined and "vague," so that today's understanding of due process has "acquired its content incrementally, over many years, from judicial interpretations" based on traditional crimes during times of peace).

54. *See id.*

55. GREENE, *supra* note 1, at 2, 44, and 17. This information is scattered piecemeal through the first forty-five pages.

56. *See id.* at 85, 131, 344.

not a biography, the book revolves so much around Denson that to omit such personal information leaves the central figure wooden.

A dedicated officer, William Denson's devotion to duty shines through the pages. Denson labored to the point of physical collapse during the course of the four trials, the job of chief prosecutor taking a heavy toll on his life.[58] He lost almost fifty pounds, and worked over 300 hours of overtime.[59] His collection and preservation[60] of the records of these "forgotten"[61] trials show how seriously he took his job. When he learned that certain sentences were later commuted, he led a campaign that resulted in congressional hearings on the matter.[62] Denson's devotion to prosecuting crimes of immeasurable inhumanity cannot be questioned.

Unfortunately, the overall lack of character development, combined with the failure to support the claim that Denson suffered in order to ensure full due process, deprives the reader of the empathy Denson deserves. The reader detects that Denson's submersion in the gruesome evidence of his trials blinded him so that he sought more for convictions than for ensuring total due process.[63] One suspects that Greene ignored Denson's failure because as a Holocaust documenter,[64] Greene's heart was with Denson's zealous prosecution; he felt indebted to Huschi and Paul Guth who provided access to their memories and the documents William Denson stored;[65] and he was awed by Denson's dedication. With more effort to reveal Denson's personality, readers could better admire Denson and better understand how a man vicariously reliving stories of torture and

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57. *See id.* at 80-84, 126-28, 224, 343-45

58. *See id.* at 227, 280.

59. *See id.* at 4, 128, 226-27, 280. Not only did Denson lose weight and collapse from exhaustion, but he also developed trembling hands and had frequent nightmares. *See id.* at 226-27. Additionally, the strain of his absence precipitated his first wife to divorce him while he was in Germany. *See id.* at 4.

60. *See id.* at 350.

61. *See id.* at 349.

62. *See id.* at 323.

63. *See id.* at 205. Denson stated later in his life that no one who worked at a concentration camp was innocent, and that he would willingly "spring the [gallows'] trap." *Id.*

64. *See Witness: Voices from the Holocaust* (PBS television broadcast, May 1, 2000) (produced and edited by Joshua M. Greene & Shiva Kumar); JOSHUA M. GREENE & SHIVA KUMAR, WITNESS: VOICES FROM THE HOLOCAUST (2001).

65. *See* GREENE, *supra* note 1, at 361-2.

oppression[66] could lose some of the objectivity a prosecutor should maintain.[67]

The Story of the Trials

The author hoped to educate the public about the little known trials held at Dachau. [68] Greene writes movingly of the Dachau, Mauthausen and Buchenwald concentration camp experiences. His narrative portions, in which he introduces officials such as Franz Ziereis, Commandant of Mauthausen, who gave his son prisoners to shoot as a birthday present, convince the reader that many defendants were despicable criminals.[69] Greene also does a fantastic job showing defense counsel's efforts for their clients, and explaining that by providing a genuine, vigorous defense, those Army officers did their duty just as prosecutors did theirs.[70]

Greene fails to follow up, though, on several characters readers meet during the book. In one chapter, Greene introduces Johannes Grimm, a civilian who managed a stone quarry where prisoners from Mauthausen worked under the supervision of SS guards.[71] Evidence showed that he provided prisoners with food from home and from two large gardens he kept.[72] Later, Greene describes the oldest defendant, sixty-two year old Emil Mueller, the company commander of a garrison unit near Mauthausen whose company shot escaping prisoners.[73] Finally, Greene describes defense witnesses who testified about five different Mauthausen doctors and other workers who comforted prisoners and tried to help them.[74] Amazingly, Greene never reveals what ultimately happened to Grimm, Mueller, or the others. The tribunal found all of the defendants guilty, but the book does not say what sentence the tribunal gave to each of these men or if their sentences were later commuted.[75] Lapses such as

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66. *See id.* at 227.

67. *See* U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS 23 (1 May 1992) (Comment to Rule 3.8, Special Responsibilities of a Trial Counsel) ("A trial counsel is not simply an advocate but is responsible to see that the accused is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.").

68. *See id.* at 4.

69. *See id.* at 142.

70. *See id.* at 40, 42, 56-57, 108, 121, 135.

71. *See id.* at 206.

72. *See id.* at 206, 214.

73. *See id.* at 193-94.

74. *See id.* at 197-98, 200.

these are a disappointing part of an otherwise fascinating story. Similarly, the book gives only superficial treatment of the nature or character of other attorneys and trial staff and their relationships and inner workings.

Conclusion

Greene, a noted director of television and film documentaries,[76] relied upon thousands of documents, trial transcripts and photographs that William Denson collected and stored in his basement.[77] The author, faced with synthesizing mounds of previously unreleased information,[78] does not fully capture the story of the trials or of William Denson. Despite this lapse, Greene's focus on providing due process to men accused of loathsome crimes arousing great passion gives modern attorneys, who may litigate cases stemming from the war on terror, a glimpse of the challenges they face, including historical and world-wide scrutiny. Despite any shortcomings under tremendous pressure, Denson and his fellow officers' efforts were highly admirable and, until now, inadequately recognized by history.

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75. *See id.* at 222-23.

76. Found at http://www.greatertalent.com/bios/green.shtml (last visited Oct. 29, 2004).

77. *See* GREENE, *supra*, note 1, at 4, 360-62.

78. *See id.* at 1, 361-62.

By Order of the Secretary of the Army:

PETER J. SCHOOMAKER
General, United States Army
Chief of Staff

Official:

Sandra R. Riley

SANDRA R. RILEY
Administrative Assistant to the
Secretary of the Army
0430704